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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM PORCH, Police Officer,

Petitioner,

v.

MICHAEL GARRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in referencing a split in the circuit courts of appeals on the issue of whether *Heck v. Humphrey* is an automatic bar to recovery in a subsequent § 1983 action where there was a prior conviction for assault "arising from the same incident?"

2. Whether the Third Circuit erred by creating a different standard of review than required by *Heck v. Humphrey*, 512 U.S. 477 (1994)?

3. Whether the Third Circuit's acceptance of Respondent's theoretical argument that was completely at odds with the summary judgment record constituted such a departure from the accepted and usual course of judicial conduct on summary judgment as to warrant review by this Court?

4. Whether the Third Circuit erred in holding, in conflict with decisions of the Fifth, Sixth, and Ninth Circuits, that the availability of self-defense was not relevant?

5. Whether the Third Circuit erred by misstating the New Jersey simple assault statute and then compounded the error by applying the misstated statute to the analysis under *Heck*?

LIST OF PARTIES

Petitioner is Defendant, William Porch. The City of North Wildwood is a Defendant. Respondent is Michael Garrison. The following Defendants were dismissed: Denise Watson, John McBride, Robert Caruso, Robert Matteucci, Paul Skill, Ted Hindes, and the North Wildwood Police Department.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 2010 U.S. App. LEXIS 7887 (3d Cir. 2010), and is reprinted at Appendix A. The opinion of the District Court of New Jersey granting summary judgment to Petitioner is reported at 2007 U.S. Dist. LEXIS 17223 (D.N.J. 2007), and reprinted at Appendix B. The opinion of the District Court of New Jersey denying Respondent's Motion for Reconsideration of the District Court's March 9, 2007 order and opinion granting Summary Judgment is reported at 2008 U.S. Dist. LEXIS 30120 (D.N.J. 2008).[1] The Order of the Third Circuit denying the Petition for Rehearing and for Rehearing *En Banc* is unreported and is reprinted at Appendix C.

JURISDICTION

The Third Circuit issued its opinion on April 16, 2010 (Appendix A) and the Petition for Rehearing and Rehearing *En Banc* was denied on May 18, 2010 (Appendix C). The within Petition, filed on behalf of Petitioner William Porch, is timely filed within ninety (90) days of the entry of the Third Circuit's Order denying the Petition for Rehearing and Rehearing

[1] The order and opinion of the District Court granting summary judgment was filed on March 9, 2007. For some unknown reason, the opinion of the District Court denying Plaintiff's Motion for Reconsideration of that order states in the body of the opinion that the order and opinion granting summary judgment were dated February 16, 2007. It is the Petitioner's position that February 16, 2007 is incorrect.

En Banc pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. This Court has jurisdiction to review the Third Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to the within Petition are as follows:

1. The Fourth Amendment provides in pertinent part: "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, ..." U.S. Const., amend. IV.

2. Title 42, Section 1983 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

42 U.S.C. § 1983.

3. N.J.S.A. 2C:12-1(a), entitled "Assault," states:

> a. Simple assault. A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

4. N.J.S.A. 2C:3-4, entitled, "Use of force in self-protection," states:

> a. Use of force justifiable for protection of the person. Subject to the provisions of this section and of section *2C:3-9*, the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> b. Limitations on justifying necessity for use of force.

(1) The use of force is not justifiable under this section:

(a) To resist an arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest; or . . .

STATEMENT OF THE CASE

In this §1983 excessive force action, Michael Garrison (referred to as "Respondent" or "Garrison") seeks to recover monetary damages for injuries stemming from his arrest in North Wildwood, New Jersey, on March 29, 2002, for resisting arrest and aggravated assault on a police officer and obstructing the administration of law, following his act of public urination. Despite his pleas of guilt to resisting arrest and assaulting the police officer Petitioner, William Porch (referred to as "Petitioner" or "Porch") Respondent claims that his subsequent § 1983 claim for alleged excessive force is not barred pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). It is the position of the Petitioner that Garrison's § 1983 claim is barred pursuant to *Heck* because Garrison's admitted facts on the summary judgment record, that he both attempted to cause and subsequently did in fact cause bodily injury to Porch by admittedly repeatedly kicking him while

Porch was attempting to arrest him, would necessarily imply the invalidity of the prior conviction for assault, N.J.S.A. 2C:12-1(a).

A. Factual background

On March 29, 2002, after consuming several alcoholic beverages and smoking marijuana at a friend's home in North Wildwood, New Jersey, Garrison and several of his friends took a cab to a nearby bar. App. 2a. At the bar, Garrison consumed several more alcoholic beverages and consumed a tablet of the illegal drug ecstacy. *Id.* Subsequently, Garrison and his friends visited multiple local bars and continued to consume alcoholic beverages. *Id.* Garrison admitted he was intoxicated when he arrived at the last bar, Keenan's Bar.[2] The toxicology report taken at the hospital an hour and a half later showed a blood alcohol content of .215% bac, and a positive reading for marijuana and amphetamines.[3] Garrison admitted during his criminal plea of guilt that he did not have a good memory of what took place on the night in question.[4]

At approximately 2:00 a.m., Garrison exited Keenan's Bar and began to urinate against the side of

[2] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page iii, ¶22.

[3] Exhibit T of Defendant's Appendix of Exhibits filed with Defendant's Motion for Summary Judgment.

[4] Exhibit G to Defendant's Appendix of Exhibits filed with Defendant's Motion for Summary Judgment.

the building. App. 2a. Officer Porch, a police officer in plain clothes who was patrolling the area by himself, noticed Garrison urinating in public and approached him, intending to arrest him for public urination. *Id.* Garrison admitted at his deposition that he was almost finished urinating when he was grabbed on his bicep.[5] Garrison admitted that in response to being grabbed on his bicep he turned around to face Officer Porch with clenched fists, and his knuckles facing away from his body, and near his chin.[6] This is where Garrison believes the story ends. The record on summary judgment, however, contained numerous admissions by Garrison which defeat his theoretical arguments under *Heck* that his resisting arrest and attempted assault occurred before the use of allegedly excessive force by Porch.

Despite Garrison's statements to the superior court judge during his guilty plea that he did not have much memory of what occurred, his memory improved when he was deposed in his § 1983 case. Garrison admitted that he lied on his plea form and lied to the judge to avoid serving jail time.[7] He specifically admitted that he lied when he admitted to resisting arrest and assaulting Officer Porch. He admitted he remembered more than he told the judge.[8] Specifically, Garrison

[5] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page iii, ¶¶30 and 33.

[6] *Id.*

[7] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page viii, ¶¶66 and 68,

[8] *Id.* at ¶¶66 and 67.

admitted in the summary judgment record that Porch identified himself as a police officer[9], that he knew Porch was a police officer[10], that Porch illuminated his badge[11] and that Garrison continued to walk away.[12] Garrison admitted Porch told him he was not free to leave and to produce identification.[13] Garrison admitted that when Porch put his hand on his body that he got rigid and began to pull away in an attempt to try to spin around and come face to face with Porch. Porch used Garrison's spinning momentum to side step him and place Garrison up against the wall of Keenan's Bar.[14] Garrison admitted that he was advised he was under arrest and to stop resisting.[15] Garrison further admitted that he attempted to head-butt Porch and continued to resist Porch's efforts to affect his arrest.[16] Garrison admitted that he raised his clenched fists at Porch and that Porch used a pulling technique on Garrison's arm to pull Garrison to the ground.[17] Garrison admitted that this act was the act of force that was excessive.[18] Importantly, when Porch

[9] *Id.* at x, ¶87

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at x, ¶91.

[14] *Id.* at xi, ¶95.

[15] *Id.*

[16] *Id.* at xi and xii, ¶¶98, 100 and 104.

[17] *Id.* at iv, ¶37.

[18] *Id.* at vi, ¶54.

was attempting to get the second handcuff on Garrison, Garrison admitted he kicked Porch several times.[19] Porch moved to Garrison's right side to attempt to place the second handcuff on him and then sat down on Garrison's knees to stop him from kicking.[20] Garrison began to complain of neck pain and Porch was able to secure Garrison's right arm and complete the handcuffing.

A small sample of the specific facts that were admitted on the summary judgment record is as follows:

> 90. Garrison then stated that "You are a cop. I know you're a cop. I'm sorry. I'm leaving. My dad's a Philly cop."
>
> **Answer to Paragraph 90. Admitted.**
>
> 93. Porch then advised Garrison that he was not free to go and the [sic that] he must produce identification.
>
> **Answer to Paragraph 93. Admitted.**
>
> 95. When Porch put his hands on Garrison's wrist Garrison's body began to get rigid. Garrison then began to pull away from Porch and began to turn toward his left in an attempt to try to spin around and come face to face with Porch. Porch

[19] *Id.* at xii,¶¶108 and 109.

[20] *Id.* at xii, ¶111.

> repeated several times, "You are under arrest. Stop resisting."
>
> **Answer to Paragraph 95. Admitted.**
>
> 104. Garrison was continuing to thrash his entire body kicking his legs and attempting to pull his arms toward his chest to avoid handcuffing.
>
> **Answer to Paragraph 104. Admitted.**
>
> 109. Porch was initially on Garrison's left side, but because Garrison kicked him several times, Porch moved over to Garrison's right side in an attempt to keep him from spinning out of his control.
>
> **Answer to Paragraph 109. Admitted.**[21]

Further, with regard to the allegedly excessive force, Garrison remembered going to the ground, but does not remember how he was forced to the ground.[22] Garrison does not remember in what position he landed, nor does he remember what part of his body hit the ground first.[23] He remembered his ear and belly being on the

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[21] Defendant's Statement of Facts filed with his Motion for Summary Judgment and Plaintiff's Response to Defendant's Statement of Facts.

[22] Plaintiff's Response to Defendant's Statement of Facts filed with Plaintiff's Opposition Brief to Summary Judgment, page iv, ¶39.

[23] *Id.* at ¶41.

sidewalk.[24] It was when he was in this position on the ground that he alleged that he heard the break in his neck.[25] Garrison "assumed" that the break in his neck occurred from Porch slamming his head on the ground, but he later admitted that the only thing he remembers is his face hitting the sidewalk, and he does not know where Porch was when that happened.[26] He further admitted that he did not know how his face was forced into the ground or what caused the fracture to his cervical spine.[27]

Following Garrison's complaints of neck pain, Porch called for medical attention, and Garrison was taken to a nearby hospital. App. 3a. In addition to Garrison suffering a cervical spine fracture, Officer Porch sustained fractures to his fourth, fifth and sixth right ribs and a laceration to his right finger.[28] Garrison was subsequently charged with aggravated assault on a police officer, resisting arrest, disorderly conduct, and public urination. App. 3a. He pled guilty to an amended charge of simple assault and to purposefully resisting arrest, and the remainder of the charges were dismissed. *Id.*

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[24] *Id.* at ¶42.

[25] *Id.*

[26] *Id.* at ¶43.

[27] *Id.* at ¶43, 44 and 49.

[28] Defendant's Statement of Facts filed with his Motion for Summary Judgment, page 23, ¶130. There was no response to that paragraph of the Statement of Facts by Plaintiff in his Response to Defendant's Statement of Facts; therefore it is deemed admitted.

B. Procedural background

On March 3, 2004, Garrison filed a Complaint in the District Court for the District of New Jersey against Defendants, which included Officer Porch and a number of other North Wildwood police officers, the North Wildwood Police Department and the City of North Wildwood. Garrison filed an Amended Complaint against the same Defendants on March 29, 2004. Therein, Garrison alleged that Porch, the City and the Police Department violated his Fifth, Eighth and Fourteenth Amendment rights and used excessive force in violation of the Constitution of the United States. He further alleged intentional infliction of emotional distress, negligent infliction of emotional distress, common law negligence, assault and battery, and civil conspiracy.

A Motion to Dismiss certain claims pursuant to Fed. R. Civ. P. 12(b)(6), resulted in two Orders from the district court. First, on May 27, 2004, without opposition from Garrison, the court dismissed Garrison's claim for violation of the Fifth and Eighth Amendment rights, the claims for punitive damages, dismissed the Police Department from the case, and dismissed the negligence claim against the City and the individual Defendants, other than Porch. On June 25, 2004, the court dismissed any tort claims asserted in Count Eight of the Complaint against the individual Defendants other than Porch, ordered that Count Eight asserted a claim for civil conspiracy under 42 U.S.C. § 1983, and dismissed Garrison's Fourteenth Amendment claim.

Porch filed an Answer and Counterclaim, and then an Amended Answer and Counterclaim. Porch asserted

counterclaims for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and common law negligence.

On November 16, 2006, the parties filed a Stipulation of Dismissal with Prejudice as to all claims against the City, except the claim for vicarious liability. On December 12, 2006, the parties filed a Stipulation of Dismissal with Prejudice as to all of the individual Defendants other than Porch. Following those dismissals, the only remaining claims were Garrison's claim against Porch for unreasonable seizure and the use of excessive force in violation of his Fourth Amendment rights; Garrison's claims against Porch for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and assault and battery; Garrison's claim against Porch for conspiracy; Garrison's claim against the City to the extent that the City is vicariously responsible for the negligent acts or omissions of Porch; and Porch's counterclaim against Garrison for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and negligence.

Porch moved for summary judgment to dismiss Garrison's claims against him and for judgment on Porch's counterclaim against Garrison. On March 9, 2007, the district court entered an Order that: a) granted Porch's Motion for Summary Judgment dismissing Garrison's constitutional and state law claims; b) denied without prejudice Porch's Motion for Summary Judgment on Porch's counterclaim for assault and battery; c) stayed Porch's counterclaim pending a forthcoming decision by the New Jersey Supreme Court;

and d) directed the Clerk of the district court to administratively terminate the action.

The dismissal of all claims against Porch meant that the City could not be held vicariously liable for any acts or omissions attributable to Porch. Therefore, all that remained in the case was Porch's counterclaim against Garrison.

Garrison filed a timely Notice of Appeal from the March 9, 2007, Order, but it was voluntarily dismissed as an interlocutory appeal under Rule 42(b) of the Federal Rules of Appellate Procedure because Porch's counterclaim had yet to be resolved. After the case was reopened Garrison filed a Motion for Reconsideration, which was denied by the district court. The district court then entered a Consent Order which provided that Porch's counterclaim be dismissed without prejudice. The Consent Order stated that Garrison's appeal of the district court's entry of summary judgment as to his excessive force claim could proceed, but that if he won the appeal and the case was remanded to the district court, Porch could then reinstate his counterclaim. After the Consent Order was entered, Garrison again filed a Notice of Appeal. The Clerk of the Third Circuit informed the parties that the Consent Order may still not be a final appealable order. Shortly thereafter, Porch consented to the dismissal of his counterclaim with prejudice, and a Stipulation of Dismissal to that effect was filed in the district court. The appeal then proceeded.

On appeal, Garrison argued that the district court erred by concluding that because Garrison pled guilty

to resisting arrest and simple assault on arresting officer Porch, Garrison's §1983 claim against Porch for use of excessive and unreasonable force was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). The Third Circuit vacated the judgment of the district court and remanded the case for further proceedings. App. 2a. Therein, the Third Circuit determined that Garrison's conviction for simple assault does not automatically preclude him from recovering on his §1983 claim. App. 10a. It also held that self-defense was not relevant based upon "the nature of Garrison's factual claims as alleged in the complaint and pleadings." *Id.* Lastly, the Third Circuit held that "a reasonable jury could find that, even considering Garrison's initial behavior which constituted simple assault, Porch used an unreasonable amount of force in arresting him, and in doing so violated his constitutional rights." App. 10a and 11a. Thus, Garrison's §1983 claim was found not to be barred by *Heck*, and the district court erred by granting Porch's motion for summary judgment on that basis. App. 11a.

A Petition for Rehearing with a suggestion for Rehearing *En Banc*, which included a request that the Third Circuit certify the question raised to this Court pursuant to Supreme Court Rule 19, was timely filed and denied. App. 40a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three distinct reasons. First, the Third Circuit referenced a split in the circuit courts of appeals on the issue of whether an assault conviction for the person arrested **automatically precludes** that person from recovering on his § 1983 claim against the arresting officer. This case presents an opportunity for the Court to resolve the split in the circuit courts referenced in the Third Circuit's decision in *Garrison*, and to settle, in no uncertain terms, that *Heck* is not an automatic preclusion to a subsequent § 1983 action, and that the correct standard for review is where, as here, the alleged excessive force and the assault on the police officer were inextricably intertwined in a single course of events unbroken by the subject being restrained, handcuffed, or submitting to a lawful arrest, the subsequent § 1983 action is barred by *Heck* because otherwise the 1983 action, if successful, would necessarily invalidate the prior convictions for resisting arrest and assault.

Second, this Court should grant the petition because the Third Circuit departed from the accepted and usual course of judicial proceedings on summary judgment by accepting a theoretical argument based upon Garrison's "claims as alleged in the complaint" that were completely at odds with the admissions of Garrison on the summary judgment record. App 10a.

Third, this Court should grant the petition because the Third Circuit misstated New Jersey's simple assault statute and applied the incorrect law in its acceptance

and analysis of Garrison's theoretical argument based upon claims that were inconsistent with the summary judgment record, all of which allowed the Third Circuit to erroneously conclude that there was no logical inconsistency between Garrison's assault conviction and his subsequent §1983 claim and that the theoretical availability of self-defense in the criminal suit was not relevant.

I. THE THIRD CIRCUIT'S REFERENCE TO A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS LED IT TO CREATE A DIFFERENT STANDARD OF REVIEW THAN REQUIRED BY *HECK*.

In *Heck v. Humphrey*, 512 U.S. 477 (1994) the Supreme Court held as follows:

> [I]n order to recover for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486-487.

The Court further held in *Heck* that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* at 487. In its analysis, this Court in *Heck* readily acknowledged that the test was not "automatic" by its reference to cases in which preclusion would not apply. *See, e.g., Heck, supra*, 512 U.S. at 487, n.7.

In *Garrison*, the Third Circuit was called upon to analyze *Heck* and whether it served as a bar to Garrison's §1983 claim. The Third Circuit stated that it had never squarely addressed the issue of whether a simple assault conviction necessarily serves as a bar to a § 1983 excessive force claim under *Heck*. App. 9a. The Third Circuit looked to other courts of appeals which considered similar cases and noted that they "generally held that the mere fact of a conviction for assault or similar conviction arising out of the same incident does not automatically preclude recovery on an excessive force claim brought under §1983. App. 9a. The Third Circuit cited *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007); *McCann v. Neilsen*, 466 F.3d 619, 620 (7th Cir. 2006); *Thor v. Howe*, 466 F.3d 173 (1st Cir. 2006); *Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006) and *Smithart v. Towery*, 79 F.3d 951 (9th Cir. 1996). After citing these five cases as representing the "majority" view, the Third Circuit referenced a split in the circuit courts of appeals on the issue by reference to the Sixth Circuit's decision in *Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2006)(holding that *Heck* barred plaintiff's § 1983

excessive force claim where plaintiff had been convicted of assaulting the police officer in the same incident). Believing there was a split in the circuit courts of appeals on the issue, and believing that it needed to side with either the "majority" or the Sixth Circuit, the Third Circuit went on to first decide whether a conviction for assault automatically precludes a plaintiff from recovering on a subsequent § 1983 claim. App. 9a – 10a. The Third Circuit agreed with the "majority" that *Heck* is not an automatic bar, but clarified its basis with the language "arising out of the same incident" as opposed to the "inextricably intertwined" language used by the Sixth Circuit in *Cummings*. The Third Circuit

> has, in essence, erroneously changed the standard of review established in *Heck* from "whether a judgment in favor of the plaintiff [under §1983] would necessarily imply the invalidity of his conviction or sentence" to whether the conviction automatically precludes recovery on the subsequent 1983 claim. *Heck*, *supra*, 512 U.S. at 487; App 9a – 10a. The Third Circuit erroneously reversed the order of analysis when it failed to follow the order of analysis promulgated in *Heck*, and confused the standard of review further by interpreting the Sixth Circuit's phrase of "inextricably intertwined" as being synonymous with "arising out of the same incident," and by interpreting the *Heck* phrase "necessarily implies the invalidity" as being synonymous with "automatically precludes." *Cummings, supra*, 418 F.3d at 683; App. 9a; *Heck*, 512 U.S. at 487; App. 9a, respectively.

This Court now has the opportunity to clarify the confusion arising from the Third Circuit's reference to a split in the circuit courts, and to clarify that the correct

standard for review under *Heck* lies with an analysis of the competent evidence composing the factual record to determine whether the alleged excessive force occurred at the time of the alleged offenses of resisting arrest and assault and is thus "inextricably intertwined" in a single course of events unbroken by the subject being restrained, handcuffed, or submitted to a lawful arrest, and whether a subsequent § 1983 action would "necessarily imply the invalidity" of the prior convictions for assault and resisting arrest. *Cummings*, *supra*, 418 F.3d at 683; *Heck*, 512 U.S. at 487.

II. THE THIRD CIRCUIT'S ACCEPTANCE OF GARRISON'S THEORETICAL ARGUMENT THAT WAS COMPLETELY AT ODDS WITH THE SUMMARY JUDGMENT RECORD CONSTITUTED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL CONDUCT ON SUMMARY JUDGMENT AS TO WARRANT REVIEW BY THIS COURT.

The Third Circuit erred when it accepted Garrison's argument that there was a version of the events which would prevent the court from barring his subsequent excessive force claim under *Heck*. App. 10a. Specifically, the Third Circuit accepted that Garrison admitted to acting in a very aggressive manner, which constituted simple assault, and that Porch allegedly responded with excessive force. App. 10a. The Third Circuit held that "[t]his is clearly a claim of excessive force in response to an assault, and the theoretical availability of a self-defense claim in other simple assault cases is of no relevance to the present case." App. 10a. As will be set

forth in more detail below, Garrison's argument was nothing more than a theoretical possibility that was completely at odds with Garrison's admissions on the summary judgment record that he continued to resist arrest and continued to assault Officer Porch even after he initially raised his clenched fists toward Porch in a menacing manner. While Petitioner concedes that Supreme Court Rule 10 states that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .", here the error was not an erroneous factual finding, but rather an acceptance of an argument that was completely at odds with the summary judgment record, which is a departure from standard judicial conduct.

In the summary judgment record, Garrison admitted the action did not stop after he resisted arrest and attempted to cause bodily injury to Porch by striking him. Garrison admitted he attempted to head-butt Porch and repeatedly kicked Porch and was resisting Porch's efforts to affect his arrest, even after the initial attempt to assault Porch by raising his clenched fists. As noted previously in the Statement of the Case section of this petition, the admitted facts on the summary judgment record prove five things; (1) Garrison's admission that the act of being taken to the ground was the act of excessive force; (2) Garrison continued to resist and assault Officer Porch by kicking him after Porch took him to the ground; (3) there was a struggle on the ground immediately after Garrison initially resisted and attempted to cause bodily injury to Porch; (4) Porch was injured from Garrison's kicks; and (5) the handcuffs were able to be put on Garrison only after Garrison complained of neck pain. The Third Circuit was obligated

to accept the undisputed material facts as presented on the summary judgment record to the district court. *See, generally, Beard v. Banks*, 548 U.S. 521 (2006). The Third Circuit did not accept the undisputed material facts on the summary judgment record but rather accepted, as argued by Garrison, that the action, and thus the analysis, stopped in the first second when Garrison initially raised his clenched fists toward Porch in a menacing manner. App. 10a. Had the Third Circuit considered the undisputed facts and admissions of Garrison on the summary judgment record, the Third Circuit would have appreciated that Garrison's argument of what occurred – namely that his resisting arrest and assaulting Officer Porch stopped after he raised his clenched fists toward Porch in a menacing manner — was plainly inconsistent with the facts to which Garrison admitted on the summary judgment record.

It is the position of Petitioner that the Third Circuit so far departed from the accepted and usual course of judicial determination of summary judgment motions under Fed. R. Civ. P. 56, that this Petition for Writ of Certiorari should be granted to correct the errors of the Third Circuit.

III. THE THIRD CIRCUIT ERRED WHEN IT MISSTATED NEW JERSEY'S SIMPLE ASSAULT STATUTE, WHICH THEREAFTER LED THE COURT TO USE THE INCORRECT STATUTE IN ITS ANALYSIS UNDER *HECK*.

The Third Circuit misstated New Jersey's simple assault statute. The Third Circuit stated that "[s]ince no deadly weapon was used in the incident, we must conclude that Garrison was convicted of either attempting or threatening to cause bodily damage to Porch." App. 3a, n 1. N.J.S.A 2C:12-1(a) states that "[a] person is guilty of assault if he: (1) Attempts to cause **or purposely, knowingly or recklessly causes bodily injury** to another; or (2) Negligently causes bodily injury to another with a deadly weapon; or (3) Attempts by physical menace to put another in fear of imminent serious bodily injury." (emphasis added) The Third Circuit should have noted that by pleading guilty to assault Garrison admitted that he not only attempted to cause but also purposely, knowingly or recklessly did cause bodily injury to Porch. The Petitioner concedes that Supreme Court Rule 10 states that a misapplication of a properly stated rule of law is rarely the error for which a Petition for a Writ of Certiorari is granted. In this case, however, it was not the misapplication of the properly stated rule of law which led to the error, but a complete misstatement of the rule of law followed by an analysis of the facts of this case using the misstated and incomplete statute which led to the error.

As set forth above in the Statement of the Case, based upon the admissions of Garrison on the summary judgment record that he repeatedly kicked Porch,

knowing he was a police officer and admitted that he had been told to stop resisting, it is clear that Garrison's theoretical argument that his assault was only an attempted assault was completely at odds with the summary judgment record. For Garrison to argue, and for the Third Circuit to conclude, that Garrison only pled guilty to the initial act of resisting arrest and the initial act of attempted assault, and that the allegedly excessive force occurred after, was completely at odds with the summary judgment record and thereby permitted the Third Circuit to incorrectly find that the subsequent § 1983 action would not invalidate his prior convictions, in violation of *Heck*. In fact, based upon the admissions on the summary judgment record, the alleged excessive force was inextricably intertwined with Garrison's continuous acts of resisting arrest and both attempts to assault and actual assault on Officer Porch which were unbroken by Garrison being restrained, handcuffed or submitting to a lawful arrest, and, as such, operates to preclude the §1983 action under *Heck*.

IV. THE THIRD CIRCUIT ERRED IN HOLDING THAT THE AVAILABILITY OF SELF-DEFENSE WAS NOT RELEVANT.

The Third Circuit held that the availability of self-defense claim in other simple assault cases is of no relevance to the present case." App. 10a. That holding was based upon the Third Circuit's erroneous acceptance of Garrison's theoretical argument that his resistance and assault only occurred before the allegedly excessive force, which argument was at odds with Garrison's admissions on the summary judgment record, and ignored the fact that Garrison kicked Porch.

For the reasons set forth in the preceding Sections, the Third Circuit erred when it accepted Garrison's argument that there was only an attempted assault, which was only committed before Porch used excessive force, **not to repel the excessive force**. That was the end of the Third Circuit's analysis, but not the end of the error. As will be set forth in detail below, the Third Circuit compounded the error by believing the action stopped as argued by Garrison, then applied only those facts to the portion of the statute it concluded was relevant to those fact, and thus ignored admitted facts relevant to what happened after the initial acts of resisting arrest and attempted assault and ignored the portion of the statute which made it a crime to actually cause bodily injury, ultimately allowing the Third Circuit to determine that the availability of self-defense was not relevant.

The facts on the summary judgment record which were not reviewed by the Third Circuit and which were necessary to fully analyze whether self-defense was relevant were that (1) Garrison admitted he knew Porch was a law enforcement officer: (2) Garrison knew that Porch was effectuating his arrest; (3) Garrison had started to walk away from Porch; (4) Garrison raised his fists and attempting to head-butt Porch; (5) Garrison admitted to subsequently struggling with Porch on the ground; and (6) Garrison repeatedly kicking Porch while on the ground to further prevent his arrest. *See*, *State v. Simms*, 369 N.J.Super. 466, 470-72 (App. Div. 2004) (defining elements of the crime).

In New Jersey, "a person may resist excessive force used by the arresting officer, even if the arrest is

otherwise legal." Cannel, *New Jersey Criminal Code Annotated*, comment 10 on N.J.S.A. 2C:3-4 (2009)(*citing, State v. Mulvihill*, 57 N.J. 151, 156-57 (1970). "[I]f the officer uses excessive or unnecessary force 'the citizen may respond or counter with the use of reasonable force to protect himself. . . .'" *State v. Simms*, 369 N.J.Super. 466, 470-72 (App. Div. 2004) (*quoting, State v. Mulvihill*, 57 N.J. at 156). Thus, the defense of self-defense is only available if the officer used unlawful force to effectuate the arrest. By pleading guilty to assault, by not raising the defense of self-defense, Garrison forfeited any claim that Porch used excessive force in effecting his arrest. To the extent that Garrison now claims that Porch's use of force in effectuating his arrest, as opposed to after he was in custody, was unlawful, it is barred because a favorable outcome in the § 1983 action would be inconsistent with the admissions Garrison made on the summary judgment record and contrary to Garrison's standing conviction for assault. The fact that the guilty plea does not contain any admissions regarding the assault or resisting arrest, as noted by the Third Circuit, is immaterial. App. 3a. While Garrison had the right under the New Jersey Criminal Code to use force to defend himself, the use of that force was only justified if he "reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of **unlawful force**. . . ." N.J.S.A. 2C:3-4(a)(emphasis added); *see also Simms, supra*, 359 N.J. Super. at 472. The summary judgment record proves that Garrison continued to assault Porch even after the excessive force, i.e. the take-down is evidence that events were inextricably intertwined, and that Garrison had the opportunity to raise self-defense, but instead pled guilty to assault, thus

acknowledging that Porch did not use unlawful force during the actual arrest. The district court's analysis and finding were correct,[29] that "[t]o allow Garrison to now argue facts to the contrary would violate the principles of *Heck*." App. 26a.

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[29] "To prevail on his excessive force claim, Garrison must prove that Porch's use of force was not objectively reasonable. To do so, Garrison could try to argue that he never attempted to, or actually did, cause bodily injury to Porch. That argument, however, would contradict his conviction for assaulting Porch. Garrison could also try to argue that the force used by Porch was not reasonably necessary. This second claim would invalidate his assault conviction because it would imply that he acted in self-defense, which is a justification defense under New Jersey law.

To establish the affirmative defense of self-defense, a criminal defendant must prove that he possessed an actual, honest belief in the necessity of using force, and that the necessity to use force was reasonable. *See, State v. Rivers*, 252 N.J. Super. 142, 599 A.2d 558, 561 (App. Div. 1991). A citizen may "protect himself whenever the force applied is excessive and unnecessary." *State v. Moriarty*, 133 N.J. Super. 563, 338 A.2d 14, 19 (App. Div. 1975). In Garrison's criminal proceedings, the fact that he did not assert self-defense, and instead pled guilty to assaulting Porch, demonstrates that the force applied to him was not excessive and unnecessary. To allow Garrison to now argue facts to the contrary would violate the principles of *Heck*."

Garrison v Porch, 2007 U.S. Dist. LEXIS 17223. App. 25a – 26a.

Moreover, because bodily injury to Porch was an element of Garrison's conviction for assault, and because Garrison admitted to kicking Porch on the summary judgment record, Garrison's theoretical argument that he only attempted to, and never did, cause bodily injury to Porch, contradicts his conviction for assaulting Porch and contradicts his admissions on the summary judgment record. *See, e.g., Ballard v. Burton*, 444 F.3d 391, 399 (5th Cir. 2006) referencing, *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999) and *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000).

It is the position of Petitioner that summary judgment was properly granted by the district court when it held that "the conviction and events giving rise to Garrison's excessive force claim are inextricably intertwined, and because Garrison pled guilty to assault, an offense for which self-defense is a defense, a judgment in favor of Garrison on his excessive force claim, would undermine his conviction." App. 29a – 30a. The summary judgment record in this case established that this is clearly not, as the Third Circuit held, "a claim of excessive force in response to an assault" and thus the Third Circuit erred in concluding that self-defense was not relevant. App. 10a.

V. HAD THE THIRD CIRCUIT BASED ITS DECISION ON THE ENTIRE SUMMARY JUDGMENT RECORD AND FIRST DECIDED WHETHER THE RESISTING ARREST AND ASSAULT ON PORCH WERE INEXTRICABLY INTERTWINED WITH THE USE OF FORCE IN A SINGLE COURSE OF EVENTS UNBROKEN BY GARRISON BEING RESTRAINED, HANDCUFFED OR SUBMITTING TO A LAWFUL ARREST, THEN THE THIRD CIRCUIT WOULD HAVE DECIDED THE CASE ALONG THE SAME LINES AS THE FIFTH, SIXTH AND NINTH CIRCUIT CASES WHERE THOSE CIRCUITS WERE CALLED UPON TO ANSWER WHETHER A SIMPLE ASSAULT CONVICTION NECESSARILY IMPLIES THE INVALIDITY OF THE SUBSEQUENT §1983 CLAIM UNDER FACTS SIMILAR TO *GARRISON*.

Had the Third Circuit not erroneously created a new test under *Heck*, not accepted the theoretical argument of Plaintiff that was at odds with the summary judgment record, not misstated New Jersey law and failed to include the cause of action for actual assault, not analyzed the theoretical argument under the misstated New Jersey law, it is the position of the Petitioner that the Third Circuit would have, and respectfully should have, decided *Garrison* similarly to the Sixth Circuit's decision in *Cummings v. Akron*, 418 F.3d 676 (6th Cir. 2005); the Fifth Circuit's decisions in *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996) (holding that *Heck* bars a civil rights claim for excessive force and false arrest where the plaintiff has been convicted of assaulting an officer

"because self-defense is a justification defense to the crime of battery of an officer, [the plaintiff's] claim that [the defendants] used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer.") and *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999) (holding that *Heck* bars a civil rights claim for excessive force and false arrest where the plaintiff has been convicted of assaulting a police officer and where the conviction necessarily implied that the officer did not use excessive force) and the Ninth Circuit's decision in *Cunningham v. Gates*, 312 F.3d 1148, 1154-1156 (9th Cir. 2002)(holding that the "police response was a natural consequence of Cunningham's provocative act . . . [and that] the two are so closely related" that the "conviction for felony murder required the jury to find that he intentionally provoked the deadly police response, and that he did not act in self-defense. Any civil claim that Cunningham was not the provocateur necessarily fails as a result of the jury verdict.")

In *Cummings v. City of Akron*, 418 F.3d 676 (6th Cir. 2005), officers attempted to arrest Cummings, but he resisted from which a struggle ensued in which the officers admitted striking Cummings with their fists and batons, spraying him with pepper spray, and a third officer using a taser gun on him. Once subdued, Cummings was handcuffed and taken into custody. He pled guilty to a reduced charge of misdemeanor assault on the officer, and the other charges were dropped. *Id.* at 680. In his subsequent § 1983 suit, Cunningham alleged excessive force against the officers.

The Sixth Circuit affirmed the district court's decision barring his subsequent §1983 claim stating:

> We agree with the magistrate judge that the success on Cummings' excessive force claim would necessarily imply the invalidity of his state assault conviction. The struggle between Cummings and the officers gave rise to both Cummings' assault conviction and the excessive force claim, and the two are inextricably intertwined. Additionally, Cummings could have raised excessive force as a defense to the assault charge, but instead he chose not to contest the charge. Thus, we hold that *Heck* bars Cummings' excessive force claim from moving forward, and we affirm the district court's grant of summary judgment to defendants on this claim. *Id.* at 682-83.

In *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996), Hudson was convicted of possession of a firearm and battery of an officer after two separate trials. In finding that Hudson's excessive force claim was not cognizable under §1983, the court stated:

> "[i]n Louisiana, self-defense is a justification defense to the crime of battery of an officer. (citations omitted) To make out a justification defense, the criminal defendant charged with battery of an officer must show that his use of force against an officer was both reasonable and necessary to prevent a forcible offense against himself. (citations omitted) Because

> self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that the three officers used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer."

Id. at 873. The court held that "this is true because the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines that conviction." *Id.* Like *Garrison*, the alleged excessive force in *Hudson* occurred during the arrest, not after the subject was restrained. *Id.* at 871.

The Fifth Circuit was similarly called upon to analyze *Heck* in *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999). There Sappington was convicted of assaulting Officer Garcia. *Id.* at 235. In his subsequent lawsuit alleging excessive force, Sappington, like Garrison, argued that the officer might have used excessive force after plaintiff offered some resistance, and in such circumstances he would have a viable civil rights claim. *Id.* at 236. The court noted that his "theoretical possibility [was] . . . completely at odds with the summary judgment record" and that his claim was thus "necessarily inconsistent with his criminal conviction." *Id.* at 236 and 237. Like Garrison, Sappington admitted in discovery that he had physical contact with the officer, and accepting this version of the events, the court held that "his claim is necessarily inconsistent with his

criminal conviction" for battery. *Id.* at 236. Based upon the arguments contained in this petition, the same can be said in *Garrison.*

Despite the reference by the Third Circuit to *Smithart v. Towery*, 79 F.3d 951 (9th Cir. 1996) as being included in the "majority" of cases with which it sided in *Garrison*, the Ninth Circuit subsequently decided *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002), which is in conflict with the Third Circuit's decision in *Garrison.* There Cunningham's conviction for felony murder required the jury to find that he intentionally provoked the deadly response, and that he did not act in self-defense. The Ninth Circuit stated that a civil claim that Cunningham was not the provocateur necessarily failed as a result of the jury verdict because the key factor was that Cunningham's crime was part of a single act for which the jury found that Cunningham was responsible. *Id.* at 1154. There was no break in the action between Cunningham's provocative act of firing on the police and the police response that plaintiff claimed was excessive. "Because the two were so closely interrelated, Cunningham's conviction foreclose[d] his excessive force claim against the officers." *Id.* at 1155. The same should have been found in *Garrison*, when, on the summary judgment record, Garrison admitted that following Porch's act of placing his hand on Garrison's bicep, Garrison not only attempted to cause bodily harm to Porch, he actually did cause bodily injury to Porch by his kicking him and Porch suffering a lacerated finger, thus inflicting the bodily injury required to be guilty of simple assault.

The cases above highlight what the Third Circuit was required to do in *Garrison* – namely to review the circumstances attendant to the conviction for simple assault and resisting arrest and carefully compare them to the summary judgment record. Had the Third Circuit done that, it would have found that Garrison's theoretical argument that he resisted arrest and attempted to assault Porch before Porch used allegedly excessive force was completely at odds with the summary judgment record. As it stands now, the Third Circuit's decision in *Garrison* is in conflict with the above-noted cases from other courts of appeals that have held that where the alleged excessive force and the assaults on the police officer are inextricably intertwined in a single course of events unbroken by the subject being restrained, handcuffed, or submitting to a lawful arrest, that *Heck* bars the subsequent § 1983 claim. *Garrison* would not have been in conflict with the above-noted cases if the Third Circuit had first determined, based upon the complete summary judgment record, whether a judgment in favor of Garrison on his 1983 claim would necessarily imply the invalidity of his convictions for resisting arrest and assault, as established by *Heck*, and followed by the Fifth, Sixth and Ninth Circuits.

VI. TO THE EXTENT THE THIRD CIRCUIT RELIED UPON THE "MAJORITY" CASES FOR ANY OTHER PROPOSITION THAN FOR THE GENERAL PROPOSITION THAT *HECK* IS NOT AN AUTOMATIC PRECLUSION TO A §1983 CLAIM, SAID RELIANCE WAS ERROR BECAUSE EACH OF THOSE CASES IS DISTINGUISHABLE FROM *GARRISON*.

From the Third Circuit's decision in *Garrison*, it is impossible to tell if the Third Circuit, in siding with the "majority" of courts of appeals that decided similar issues, appreciated the factual differences between those cases and *Garrison*. It is unknown why the Third Circuit believed it needed to side with any other circuit on the issue, nor why the Third Circuit engaged in the "automatic preclusion" analysis in the first instance. The *Heck* analysis is based on an analysis of the facts of each case and since the Third Circuit did not explicitly note any factual or procedural differences between *Garrison* and the cases constituting the "majority," and because the differences are significant, they will be analyzed here.

Despite the Third Circuit's reliance on the First Circuit's decision in *Thor v. Howe*, there the court did not actually decide the *Heck* issue because the record did not permit a determination of the requisite relatedness. *Thor v. Howe*, 466 F.3d 173, 180 (1st Cir. 2006). The facts are significantly different from *Garrison* however, and worth mentioning. Thor pled guilty to three counts of assault and battery with a deadly weapon. Thor offered two theories in his defense. The first was that he was not guilty of assault at all,

which is squarely *Heck* barred. *Id.* at 180. The second was that "his excessive force claim need not impugn his convictions for assault and battery with a dangerous weapon in order to establish that Officer Howe used excessive force. *Id.* "Thor [said] that even if his car had previously hit the cruisers and brushed Officer Dibara's body, by the time of the shooting, Thor was stationary in a car, boxed in with nowhere to go, and posed no threat to the officers, who had been told that he had no gun." *Id.* Unlike *Thor*, the Third Circuit had admissions from Garrison on the summary judgment record that he not only initially resisted arrest and attempted to cause Porch bodily injury to Porch by raising his clenched fists at him, but that he also continued to resist arrest and actually did cause bodily injury to Porch, all of which arose from an inextricably intertwined single course of events that was unbroken by Garrison being restrained, handcuffed, or submitting to a lawful arrest.

The Seventh Circuit's decision in *McCann v. Nielsen*, while it stands for the general proposition asserted by the Third Circuit, was procedurally very different from *Garrison* because it involved a motion to dismiss under Fed. R. Civ. P. 12(c) and not a motion for summary judgment with a complete record. *McCann v. Nielsen*, 466 F.3d 619, 620 (7th Cir. 2006). The focus in *McCann* was on whether the complaint, not a full summary judgment record, contained factual allegations that "necessarily impl[ied]" the invalidity of his convictions. *Id.* at 622. The Third Circuit may not have appreciated this difference inasmuch as it stated in *Garrison* that the issue of self-defense was not relevant "due to the nature of Garrison's factual claims as alleged in his complaint and pleadings." App. 10a. Before the

Third Circuit in *Garrison* were the Petitioner's pleadings and the summary judgment record which contained Garrison's admissions that he continued to resists and assault Officer Porch, causing him injury, even after the initial resistance and attempt at bodily injury. In *McCann*, the court did not have the benefit of a full summary judgment record; in *Garrison* the Third Circuit did, and the record was completely at odds with the arguments made by Garrison and accepted by the Third Circuit.

Next, the Third Circuit relied on *Ballard v. Burton*, 444 F.3d 391 (5th Cir. 2006) which is also factually distinguishable from *Garrison*. Ballard's conviction was for assault by physical menace, on an officer who was not a defendant in plaintiff's § 1983 claim. Moreover, count two of the indictment to which Ballard entered his guilty plea, stated that his acts were "not in necessary self-defense." *Id.* at 398. The Fifth Circuit held that *Heck* did not bar an excessive force claim as to Officer Burton because the plaintiff did not plead guilty to assaulting Officer Burton. *Id.* at 399. Here, Garrison is claiming Officer Porch used excessive force and Garrison pled guilty to assaulting Officer Porch. Thus, *Ballard* can hardly be said to have resolved the same issue as in *Garrison*.

Finally, the Third Circuit's reliance upon the Eleventh Circuits decision in *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007) in support of its "majority" opinion is curious because there the Eleventh Circuit specifically acknowledged therein that in a case where there is the requisite "tightness of events" and where none of the excessive force occurred after the subject had been

subdued, that such a factual scenario would force the § 1983 suit and the underlying conviction to be logically contradictory, and thus barred by *Heck*. *Id.* at 885. *See also, Smith v. City of Hemet*, 394 F.3d 689, 698-99 (9th Cir. 2005) (*en banc*) ("A 1983 action is not barred by *Heck* unless the alleged excessive force occurred at the time the offense [of resisting arrest] was being committed. . . .") *Dyer* is factually distinguishable from *Garrison* because in *Dyer* there was evidence from Dyer's version of events which indicated that some of the excessive force occurred after Dyer had been subdued. *Id.* at 883. That is not the case in *Garrison*. While Garrison argued similarly to Dyer – namely that he resisted arrest and assaulted Officer Porch and then Porch used allegedly excessive force- the theoretical possibility that existed on the record in *Dyer* does not exist in Garrison's case because Garrison admitted on the summary judgment record that he initially resisted arrest and attempted to cause bodily injury to Porch and that he subsequently continued to resist arrest and in fact kicked Porch, thus admitting both elements of simple assault under N.J.S.A. 2C:12-1(a), and after all of that he was able to be subdued. In footnote 7 of its Opinion, the Eleventh Circuit noted that "[i]f the excessive force was not met by resistance by Dyer, then that excessive force could not have been used as a defense to the underlying conviction. Therefore, that force could support a § 1983 suit without negating the underlying conviction." *Id.* at 883, n.7. Stated differently, and as applicable in *Garrison*, if the alleged excessive force is met by resistance, then that excessive force could have been used as a defense to the underlying conviction, and that force could not support a §1983 suit without necessarily negating the underlying conviction.

Therefore, based upon the summary judgment record, Garrison should not be able to avail himself of the same theoretical possibility Dyer used to escape a bar to her excessive force claim under *Heck*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 16, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2453

MICHAEL GARRISON,

Appellant

v.

WILLIAM PORCH, Police Officer;
CITY OF NORTH WILDWOOD;
NORTH WILDWOOD POLICE DEPARTMENT;
DENISE WATSON; JOHN MCBRIDE;
ROBERT CARUSO; ROBERT MATTEUCCI;
PAUL SKILL; TED HINDES, Police Officers

On Appeal from the United States District Court
for the District of New Jersey
(Civil No. 1-04-CV-01114)
District Judge: Hon. Noel L. Hillman

Argued November 19, 2009

Before: RENDELL, BARRY, and CHAGARES, *Circuit Judges.*

(Filed: April 16, 2010)

Appendix A

OPINION OF THE COURT

CHAGARES, *Circuit Judge.*

Michael Garrison appeals from the District Court's entry of summary judgment as to his claims against William Porch. For the reasons set forth below, we will vacate and remand.

I.

Because we write solely for the benefit of the parties, we will only briefly summarize the essential facts. Since the procedural posture is a grant of summary judgment, we construe all facts in the light most favorable to Garrison as the non-moving party.

On the night of March 29, 2002, after consuming several alcoholic beverages and smoking marijuana at a friend's home in North Wildwood, New Jersey, Garrison and several of his friends took a cab to a nearby bar. At the bar, Garrison had several more alcoholic drinks and consumed a tablet of the illegal drug ecstasy. Throughout the rest of the evening, Garrison and his friends visited multiple local bars and continued to consume alcoholic beverages.

At approximately 2:00 a.m., Garrison exited one such bar, walked into an adjoining alley, and began to urinate against a wall. Porch, a plainclothes police officer patrolling the area, noticed this and approached Garrison, intending to arrest him for public urination.

When Porch attempted to handcuff Garrison, Garrison spun around, and raised up his hands in an aggressive manner as if to strike Porch. In response, Porch grabbed Garrison by his arm, forced him to the ground, and jumped on Garrison's back, where Porch was able to place his handcuffs on Garrison.

At this point, Garrison began to complain of neck pain. Porch called for medical attention, and Garrison was taken to a nearby hospital. It was ultimately determined that he had a cervical spine fracture, which required nearly a month of inpatient care and over four months of outpatient rehabilitation therapy.

Garrison was charged with aggravated assault on a police officer, resisting arrest, disorderly conduct, and public urination. He pled guilty to an amended charge of simple assault[1] and to purposefully resisting arrest, and the remainder of the charges were dropped.

On March 3, 2004, Garrison brought suit in the District Court naming as defendants Porch, a number

1. New Jersey's simple assault statute criminalizes intentional attempts to cause bodily injury, negligent bodily injury with a deadly weapon, or "[a]ttempts by physical menace to put another in fear of imminent serious bodily injury." N.J. Stat. Ann. § 2C:12-1a. Since no deadly weapon was used in the incident, we must conclude that Garrison was convicted of either attempting or threatening to cause bodily damage to Porch. There were no specific facts of the crime in the indictment or admitted by Garrison at the guilty plea, and Garrison denies actually striking Porch.

of other North Wildwood police officers, the North Wildwood Police Department and the city of North Wildwood. He sought damages under 42 U.S.C. § 1983 for violation of his Fourth Amendment rights and under a number of state law causes of action. Defendants filed motions to dismiss Garrison's claims. In separate orders, the District Court dismissed most of Garrison's claims, and on November 16, 2006, Garrison agreed to a stipulation of dismissal with prejudice as to his claims against all defendants except Porch, and the City only insofar as it may be vicariously liable for Porch's actions.

Porch filed a counterclaim against Garrison, seeking damages for assault and battery and several other state law claims. Porch moved for summary judgment as to both Garrison's state and federal claims against him, and his counterclaim against Garrison. On March 9, 2007, the District Court granted Porch's motion as to Garrison's claims,[2] but denied the motion as to Porch's counterclaim.

Garrison filed a timely notice of appeal from the March 9 order, but it was voluntarily dismissed as an interlocutory appeal under Rule 42(b) of the Federal Rules of Appellate Procedure because Porch's counterclaim had not been resolved. After the case was reopened, Garrison filed a Motion to Reconsider, which the District Court denied. The District Court then

2. On appeal, Garrison does not contest the entry of judgment on his state law claims, and we therefore only consider whether the District Court's entry of judgment on Garrison's § 1983 claim was in error.

entered a consent order which provided that Porch's counterclaim be dismissed without prejudice. The consent order stated that it allowed Garrison to appeal the District Court's entry of summary judgment as to his excessive force claim, but that if he won the appeal and the case was remanded to the District Court, Porch could then reinstate his counterclaim.

After the consent order was entered, Garrison again filed a notice of appeal. The Clerk of this Court informed the parties that the consent order may still not be a final appealable order under 28 U.S.C. § 1291 because Porch retained the ability to reinstate his counterclaim. Shortly thereafter, Porch consented to the dismissal of his counterclaim with prejudice, and a stipulation to that effect was filed in the District Court.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a).

The parties were directed to brief the issue of appellate jurisdiction. Both parties did so, and they agree that this Court has appellate jurisdiction over this matter. The issue is whether or not the consent order, in conjunction with the stipulation agreement, is a final judgment under 28 U.S.C. § 1291.

This Court has previously held that we do not generally have appellate jurisdiction when there is still a chance, contingent upon the outcome of the appeal,

that a claim dismissed without prejudice could be reinstated. *Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 438 (3d Cir. 2003). The consent order dismissed Porch's counterclaim without prejudice, which meant that the counterclaim could be resurrected if Garrison won on appeal. The consent order was therefore not itself a final judgment under § 1291.

However, the stipulation agreement provided that the dismissal of Porch's counterclaim was with prejudice, making the dismissal a final judgment. We have previously held that a party whose claims had been dismissed without prejudice may explicitly agree that claims be dismissed with prejudice. When the party does so, the claims may not be reinstated, the judgment is final within the meaning of § 1291, and this Court properly has appellate jurisdiction. *See id.* (holding that the exercise of appellate jurisdiction was proper under § 1291 where original order dismissed certain claims without prejudice, but the party bringing those claims agreed that the claims at issue should be dismissed with prejudice *at oral argument* and obtained an order from the district court shortly thereafter to that effect). This explicit agreement does not necessarily have to be a court order dismissing the claim or claims with prejudice in order to be valid. *See Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991) (holding that appellate jurisdiction was appropriate where initial dismissal was without prejudice, but "plaintiffs renounced, through letter briefs, any intention to take further action against the . . . Defendants."). We therefore have appellate jurisdiction pursuant to § 1291.

We apply a plenary standard of review to a district court's grant of summary judgment. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993).

III.

Garrison asserts that the District Court erred in granting summary judgment on his excessive force claim against Porch under § 1983. We agree.

The District Court based its entry of summary judgment on the Supreme Court's decision in *Heck v. Humphrey*, in which the Court held that a plaintiff may not recover damages under § 1983 if doing so would imply the invalidity of a prior conviction. 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *see also Gilles v. Davis*, 427 F.3d 197, 208-09 (3d Cir. 2005) ("Under *Heck*, a § 1983 action that impugns the validity of the plaintiff's underlying conviction cannot be maintained unless the conviction has been reversed on direct appeal, or impaired by collateral proceedings."). A claim for damages under § 1983 will only be barred under *Heck* when the claim, if successful, necessarily invalidates the prior conviction. The District Court held that Garrison could not possibly succeed on his excessive force claim without implying the invalidity of his conviction for simple assault.

The Fourth Amendment requires police officers to use only the degree of force that is reasonably necessary to place a suspect under arrest. *See Tennessee v. Garner*, 471 U.S. 1, 9-10, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

If the force used in effecting an arrest is beyond what was reasonably necessary, the arrestee may seek monetary damages for the infringement of his or her constitutional rights under § 1983. In determining whether or not the force used in effecting an arrest was unreasonably excessive, a finder of fact is to consider the totality of the circumstances surrounding the arrest. *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

This Court has previously determined that a conviction for resisting arrest does not necessarily preclude an arrestee for recovering damages on a § 1983 excessive force claim. *Nelson v. Jashurek*, 109 F.3d 142, 145-46 (3d Cir. 1997). In doing so, we reversed the district court, which had informed the jury that the arrestee could only recover damages on his claim if he showed that his actions did not justify the use of "substantial force" by the police officer. However, we observed that "there undoubtedly could be 'substantial force' which is objectively reasonable and 'substantial force' which is excessive and unreasonable." *Id.* at 145. We ultimately held that a reasonable juror, considering the totality of the circumstances, could find that the arrestee resisted arrest, but was still subjected to an unreasonably excessive level of force by the police officer in response. *Id.* at 146.

Porch here argues that because Garrison pled guilty to assaulting the arresting officer, the force Porch used in taking Garrison into custody could not have been excessive. However, the fact that Garrison's threatened or attempted use of force was unlawful does not

automatically mean that there is no use of force that Porch could have used in response which could have risen to the level of unreasonable and excessive. Porch was still constrained to use only the level of force which was reasonable to bring Garrison into custody. While the fact that Garrison was acting in an unruly and threatening manner certainly factors into the totality of the circumstances and may have justified a greater use of force than would have been reasonable had Garrison been peaceful and cooperative, it certainly did not dispense with the reasonableness requirement altogether.

While this Court has not squarely addressed the issue of whether a simple assault conviction necessarily serves as a bar to a § 1983 excessive force claim under *Heck*, other courts of appeals to have considered factually similar cases have generally held that the mere fact of a conviction for assault or similar conviction arising out of the same incident does not automatically preclude recovery on an excessive force claim brought under § 1983. *See, e.g., Dyer v. Lee*, 488 F.3d 876, 883 (11th Cir. 2007); *McCann v. Nielsen*, 466 F.3d 619, 620 (7th Cir. 2006); *Thore v. Howe*, 466 F.3d 173, 180 (1st Cir. 2006); *Ballard v. Burton*, 444 F.3d 391, 400-01 (5th Cir. 2006); *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (per curiam). *But see Cummings v. City of Akron*, 418 F.3d 676, 682-83 (6th Cir. 2005) (holding that *Heck* barred plaintiff's § 1983 excessive force claim where plaintiff had been convicted of assaulting the police officer in the same incident). We agree with the majority of other courts of appeals to have faced this issue in rejecting

Porch's argument that Garrison's conviction for simple assault automatically precludes him from recovering on his § 1983 claim.

Porch also argues that because Garrison could have, but did not, used self-defense as an affirmative defense to the charge of simple assault, his conviction establishes as a matter of law that his conduct was not justified, and he is therefore barred by *Heck* from recovering on his excessive force claim. However, due to the nature of Garrison's factual claims as alleged in his complaint and pleadings, the issue of self-defense is irrelevant. Garrison has not claimed that his act of simple assault was committed to protect himself. He acknowledges that he assaulted Porch before Porch allegedly used excessive force. He claims that after his act of assault, Porch then responded by using a degree of force that was much greater than was reasonably necessary to subdue him and place him under arrest. This is clearly a claim of excessive force in response to an assault, and the theoretical availability of a self-defense claim in other simple assault cases is of no relevance to the present case.

Garrison admits that upon initially being confronted by Porch, he acted in a very aggressive and threatening manner, which constituted simple assault. At that point, Garrison alleges that Porch responded by using an excessive level of force by flinging him to the ground and jumping on top of him, fracturing his vertebrae. There is no logical inconsistency in these two assertions. A reasonable jury could find that, even considering

Garrison's initial behavior which constituted a simple assault, Porch used an unreasonable amount of force in arresting him, and in doing so violated his constitutional rights. Garrison's § 1983 claim is therefore not barred by *Heck*, and the District Court erred by granting Porch's motion for summary judgment.[3]

IV.

For these reasons, we will vacate the judgment of the District Court and remand the case for further proceedings.

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3. The Court emphasizes that our holding is in no way an assessment of the merits of Garrison's claim. We are reversing the District Court solely because Garrison's claim for relief is not necessarily inconsistent with the fact of his simple assault conviction. In this respect the case before us is similar to *Nelson*, in which this Court wrote that "while we do not doubt that even on the facts as presented by Nelson it will be difficult for him to establish liability in this case, we do not see why a judgment in his favor would throw the validity of his conviction into doubt." 109 F.3d at 146.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 9, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. Action No. 04-1114 (NLH)

MICHAEL GARRISON,

Plaintiff,

v.

WILLIAM PORCH, et al.,

Defendants.

OPINION

HILLMAN, District Judge

This matter has come before the Court on Defendant's motion for summary judgment on Plaintiff's claims that Defendant violated his Fourth Amendment rights when Defendant unreasonably seized him and used excessive force in effecting his arrest. Defendant has also moved for summary judgment on Plaintiff's conspiracy claims, as well as Plaintiff's state law claims. Also pending before the Court is Defendant's motion for summary judgment as to Plaintiff's liability on Defendant's counterclaim against Plaintiff for the intentional tort of assault and

battery. For the reasons expressed below, Defendant's motion for summary judgment on Plaintiff's claims against him will be granted, Defendant's motion for summary judgment on his assault and battery counterclaim against Plaintiff will be denied without prejudice, and Defendant's counterclaims against Plaintiff will be stayed.

I. SUMMARY OF THE FACTS

According to the parties' uncontested statement of facts, on the evening of March 29, 2002, Plaintiff Michael Garrison and several friends met each other at a North Wildwood, New Jersey home, and from there they all took a cab to Moore's Bar. Prior to arriving at Moore's Bar, Garrison had consumed one or two beers and had smoked marijuana. At the bar, Garrison consumed two or three mixed drinks and took an ecstasy pill. From Moore's Bar, the group walked to one or two other bars, at which Garrison consumed more alcoholic beverages. After midnight, the group walked to Keenan's Bar, where Garrison, already intoxicated, consumed a beer. At approximately 1:50am, Garrison and the rest of the group exited Keenan's Bar, and Garrison began to urinate outside the bar. Garrison's zipper was down and his pants were unbuttoned while he was urinating. Defendant William Porch, a City of Wildwood police officer who was dressed in plain clothes for a suspicious person/burglary detail, observed Garrison urinating outside of the bar.

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At this point, the parties' version of events diverge. According to Garrison's deposition testimony, Porch approached Garrison, grabbed his bicep, turned him around, and held both of Garrison's fists in his hands. When Garrison turned around, he had both fists clenched up near his chin with the knuckles facing away from his body. Garrison next remembers Porch pulling him to the ground, but does not recall how he was forced to the ground, which part of his body hit the ground first, or in what position he landed. Once he was on the ground, Garrison recalls his ear and stomach being on the sidewalk. At this point, Garrison cannot specifically remember what occurred, but he does recall that his face was forced into the ground and that he heard the bones breaking in the back of his neck, he went warm, and then totally limp. Garrison does not recall resisting arrest.

According to Porch, he approached Garrison as he was just walking away from the building after urinating. Porch states that he identified himself as a police officer and illuminated his badge with his flashlight, but Garrison continued to walk away. When Garrison was about eight feet away, Porch told Garrison that he was not free to go and asked him to produce identification. Porch states that Garrison used expletives and refused to comply. Porch told Garrison that he was not free to leave, he must produce identification, grabbed Garrison's left wrist with both hands using a "soft-touch empty-hand" technique, and told him he was under arrest. According to Porch, Garrison's body began to get rigid and he began to pull away and turn around in

an attempt to face Porch. Porch states that he repeated several times that Garrison was under arrest and commanded him to stop resisting. At this point, Porch states that he thought Garrison was going to strike him, so he used Garrison's spinning momentum to sidestep him and place him up against the wall. Porch states that Garrison attempted to head-butt Porch "in reverse" and continued to resist arrest. In order to avoid Garrison's head-butt, Porch states that he moved away and Garrison spun around with his fist raised in a motion to hit Porch. Porch then used a pulling technique to Garrison's arm to pull him to the ground. While he was on the ground, Porch states that Garrison continued to thrash his entire body, kick his legs, and pull his arms toward his chest to avoid handcuffing. According to Porch, Garrison's five friends were completely surrounding them and shouting and gesturing in rage toward Porch's attempts to effect Garrison's arrest.

Porch was able to secure one handcuff, but he had to move from Garrison's left side to his right side because Garrison kicked him several times. Porch then radioed for back-up. When another officer arrived, Porch sat down below Garrison's knees to stop him from kicking. During this encounter, Porch states that Garrison kicked him repeatedly, trashed his head back and forth, "continuously trying to spin out of control," and continued to yell obscenities. At this point, Garrison began to complain of neck and back pain and his body became limp and stationary. Garrison told Porch that Porch broke his neck. Porch was then able to secure

Garrison's right arm and complete handcuffing. An ambulance was called and Garrison was transported to the hospital.[1]

Garrison was charged with aggravated assault on a police officer, resisting arrest, disorderly persons conduct, and urinating in public. The grand jury indicted Garrison on the aggravated assault and resisting arrest charges. On May 30, 2003, Garrison pled guilty to an amended charge of simple assault in violation of N.J. Stat. Ann. 2C:12-1(a), and purposefully resisting arrest, in violation of N.J. Stat. Ann. 2C:29-2(a).[2]

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1. According to Garrison's Complaint, he was transported to Burdette Tomlin Memorial Hospital, where he was unable to move his lower extremities and was found to have neural deficits. He was then transferred to Atlantic City Medical Center, City Division, where X-Rays revealed a possible cervical spine fracture located at C5-C6. Garrison was then placed in a halo, intubated and sedated, and airlifted to Thomas Jefferson University Hospital, where he was an inpatient from March 30, 2002 through April 4, 2002. While at Thomas Jefferson University Hospital, Garrison was diagnosed with a C6 body fracture, C6 bilateral laminar fracture, C5 right laminar fracture, and spinal cord edema and intramedullary signal changes from C5 to C7. He was then transferred to Magee Rehabilitation Hospital where he was an inpatient from April 4, 2002 through April 26, 2002. Garrison received outpatient rehabilitation therapy at Magee Riverfront Outpatient Physical Therapy from April 29, 2002 through September 5, 2002.

2. N.J. Stat. Ann. 2C:12-1(a), Simple assault, provides,

A person is guilty of assault if he:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(Cont'd)

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II. PROCEDURAL HISTORY

Garrison filed a Complaint against numerous parties alleging numerous claims. Porch filed a counterclaim against Garrison. Through Orders of the Court and stipulation of the parties, the only claims that remain pending are: 1) Garrison's claims against Porch for unreasonable seizure and the use of excessive force in

(Cont'd)

> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.
>
> Simple assault is a disorderly persons persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons persons offense.
>
> N.J. Stat. Ann. 2C:29-2(a), Resisting arrest; eluding officer, provides,
>
> a. (1) Except as provided in paragraph (3), a person is guilty of a disorderly persons persons offense if he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest.
>
> . . .
>
> It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance.

violation of his Fourth Amendment rights; 2) Garrison's claims against Porch for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and assault and battery; 3) Garrison's claim against Porch for conspiracy; 4) Garrison's claim against the City of North Wildwood to the extent that the City is vicariously responsible for the negligent acts or omissions of Porch; and 5) Porch's claims against Garrison for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

Porch has moved for summary judgment on all of Garrison's claims against him. Porch has also moved for summary judgment as to Garrison's liability on Porch's assault and battery counterclaim.

III. DISCUSSION

Porch argues that he is entitled to summary judgment on all of Garrison's claims because of Garrison's guilty pleas to the disorderly persons offenses of simple assault and resisting arrest. Porch also argues that Garrison's convictions for these offenses establishes his liability as a matter of law on Porch's assault and battery counterclaim.[3] The effect of Garrison's

3. In his opposition to Porch's motion for summary judgment, Garrison raises for the first time the claim that Porch committed fraud by not including certain incidents in his official report, and by claiming that Garrison broke his ribs even though (Cont'd)

convictions on his and Porch's claims will be discussed in turn.

A. Whether Garrison's guilty pleas to the disorderly persons offenses of simple assault and resisting arrest precludes his constitutional violation claims for unreasonable seizure and excessive force

Porch argues that Garrison's claims for "freedom from unreasonable physical seizure" and "freedom from the use of excessive and unreasonable force" are barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Under *Heck*, if a favorable judgment on a § 1983 damages claim would "necessarily imply the invalidity" of the plaintiff's conviction or sentence, the claim must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Heck*, 512 U.S. at 486-87. Thus, the question before the Court is whether a finding in favor of Garrison on his unreasonable seizure claim and/

(Cont'd)

Garrison's expert claims that Porch's treatment records do not demonstrate the temporal element that Porch's broken ribs occurred on March 30, 2002. (Def.'s Br. at 3-4.) Porch argues that these fraud claims should be dismissed because Garrison failed to plead them in his Complaint with the required particularity, and because Garrison has failed to state a valid claim for fraud. Because Garrison did not assert these fraud claims in his Complaint or Amended Complaint, and these fraud claims do not affect the viability of his other pleaded claims, the Court does not need to address this issue.

or excessive force claim necessarily implies the invalidity of his guilty pleas for the disorderly persons offenses of simple assault and resisting arrest.[4] In order to answer that question, the elements of Garrison's § 1983 claims and the elements of the crimes to which Garrison pled guilty must be compared.

1. Whether Garrison's Claim for Unreasonable Seizure under the Fourth Amendment is Barred by *Heck*

A "person is seized for Fourth Amendment purposes only if he is detained by means intentionally applied to terminate his freedom of movement." *Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000). Garrison admits that he was seized, but claims that Porch's seizure of him was unreasonable. It is unclear whether Garrison is arguing that Porch did not have probable cause to detain and/or arrest him, or that he was falsely arrested, or that Porch's physical contact with him was unreasonable. If Garrison is only contending that Porch's

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4. Garrison argues that *Heck* does not bar his constitutional claims because his guilty pleas were for disorderly persons persons offenses, which are not "crimes" in the State of New Jersey. (Pl.'s Br. at 5-6.) Garrison's argument is untenable. The Third Circuit has held that pleading guilty to a disorderly persons conduct charge is sufficient to bar a subsequent § 1983 claim. See *Gilles v. Davis*, 427 F.3d 197, 209 n.8 (3d Cir. 2005) (holding that under *Heck* entering into an Accelerated Rehabilitation Disposition (ARD) program pursuant to a guilty plea for a disorderly persons conduct offense does not constitute a favorable termination, and thus may bar a plaintiff's § 1983 claim).

physical contact with Garrison was unreasonable, that claim is subsumed by his claim of "excessive and unreasonable force," and the standard for that violation will be discussed below. To the extent that Garrison is claiming that Porch lacked probable cause to detain him, and, as a result, his arrest was false, it is clearly established under the Fourth Amendment that the police may not make an arrest except upon probable cause. "Probable cause to arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. Rather, probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482-83 (3d Cir. 1995) (citations omitted). For a § 1983 claim based on false arrest, the inquiry is "not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense." *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1988).

If judgment were to be entered in favor of Garrison on this claim, it would mean that Porch did not have probable cause to detain and subsequently arrest Garrison. Thus, it must be determined whether this finding would invalidate Garrison's convictions for simple assault and/or resisting arrest. By his guilty plea to the offense of resisting arrest, Garrison admitted that he purposely prevented or attempted to prevent a law

enforcement officer from effecting his arrest. As explained by the Supreme Court, pleading guilty to the crime of resisting arrest means that Garrison intentionally prevented "a peace officer from effecting a *lawful* arrest," and that in order for Garrison to prevail on his false arrest/unreasonable seizure claim, "he would have to negate an element of the offense of which he has been convicted." *Heck*, 512 U.S. at 487 n.6 (emphasis in original); see also *Nelson v. Jashurek*, 109 F.3d 142, 144 (3d Cir. 1997) (interpreting Heck to hold that "a civil suit for an unreasonable seizure predicated on a false arrest would be barred so long as a conviction for resisting the same arrest remained unimpaired").

Consequently, because it is undisputed that Garrison's convictions have not been invalidated, Garrison's § 1983 claim for unreasonable seizure is barred.[5]

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5. Even if Garrison's unreasonable seizure claim was not barred by *Heck*, Porch would be entitled to summary judgment. Generally, "the question of probable cause in a section 1983 damage suit is one for the jury," *Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998), but a district court may conclude, "that probable cause did exist as a matter of law if the evidence, viewed most favorably to defendant, reasonably would not support a contrary factual finding," *Sherwood v. Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997); *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000) (holding that probable cause only requires a "fair probability" that a person committed the relevant crime). Here, Garrison does not dispute that he was urinating outside the bar when Porch approached him. Thus, Porch had probable cause to seize Garrison because the circumstances within Porch's knowledge were sufficient to warrant a reasonable person to believe that an offense was being committed by Garrison.

2. Whether Garrison's Claim for Excessive and Unreasonable Force under the Fourth Amendment is Barred by *Heck*

The next question is whether Garrison's claim for excessive and unreasonable force under the Fourth Amendment is barred by Heck. The threshold inquiry in an excessive force case is whether "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations.'" *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *see Brower v. County of Inyo*, 489 U.S. 593, 599, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). The proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The Third Circuit has added other relevant factors, including, "the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

Based on the test for a claim for excessive force, Porch argues that a judgment in favor of Garrison on

his excessive force claim would invalidate his guilty pleas to resisting arrest and simple assault. Garrison counters that based on *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997), his guilty pleas are not a bar to his excessive force claim.

In *Nelson*, the plaintiff was convicted in state court of resisting arrest in violation of a Pennsylvania statute, "which provides that a person is guilty of resisting arrest if 'with the intent of preventing a public servant from effecting a lawful arrest [he] creates a substantial risk of bodily injury to the public servant . . . or employs means justifying or requiring *substantial force* to overcome the resistance.'" *Nelson*, 109 F.3d at 145 (emphasis in original). Following his conviction, the plaintiff filed suit pursuant to § 1983 against the arresting officer, claiming that the officer used excessive force in effecting his arrest. *Id.* at 144. The district court dismissed the plaintiff's excessive force claim, finding that *Heck* barred his claim because a judgment in his favor would invalidate his conviction for resisting arrest. *Id.* at 144-45. On appeal, the Third Circuit reversed, holding that a finding that the officer used excessive "substantial force" would not imply that the arrest was unlawful. *Id.* at 145. The court explained,

> Our difficulty with the district court's result is that the fact that [the officer] was justified in using 'substantial force' to arrest [the plaintiff] does not mean that he was justified in using an excessive amount of force and thus does not mean that his actions in effectuating

> the arrest necessarily were objectively reasonable. In short, there undoubtedly could be 'substantial force' which is objectively reasonable and 'substantial force' which is excessive and unreasonable.

Id.

Despite Garrison's reliance on *Nelson*, it is distinguishable from the case here because the plaintiff in *Nelson* was only convicted of resisting arrest, while Garrison was also convicted of assault. Garrison pled guilty to N.J. Stat. Ann. 2C:12-1(a), Simple Assault, and admitted that he attempted to cause or purposely, knowingly or recklessly caused bodily injury to Porch. It would incongruous to hold that Garrison "attempted to cause or purposely, knowingly or recklessly caused bodily injury to" Porch, while at the same time Porch's use of force in effecting Garrison's arrest was excessive.

The incongruity is even more evident when looking at what Garrison needs to prove to prevail on his excessive force claim. To prevail on his excessive force claim, Garrison must prove that Porch's use of force was not objectively reasonable. To do so, Garrison could try to argue that he never attempted to, or actually did, cause bodily injury to Porch. That argument, however, would contradict his conviction for assaulting Porch. Garrison could also try to argue that the force used by Porch was not reasonably necessary. This second claim would invalidate his assault conviction because it would imply that he acted in self-defense, which is a justification defense under New Jersey law.

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To establish the affirmative defense of self-defense, a criminal defendant must prove that he possessed an actual, honest belief in the necessity of using force, and that the necessity to use force was reasonable. *See State v. Rivers*, 252 N.J. Super. 142, 599 A.2d 558, 561 (N.J. Super. Ct. App. Div. 1991). A citizen may "protect himself whenever the force applied is excessive and unnecessary." *State v. Moriarty*, 133 N.J. Super. 563, 338 A.2d 14, 19 (N.J. Super. Ct. App. Div. 1975). In Garrison's criminal proceedings, the fact that he did not assert self-defense, and instead pled guilty to assaulting Porch, demonstrates that the force applied to him was not excessive and unnecessary. To allow Garrison to now argue facts to the contrary would violate the principles of *Heck*.

A similar analysis was applied in a recent Third Circuit case. In *Jennings v. Fetterman*, 197 Fed. Appx. 162, 163 (3d Cir. 2006), Jennings, the plaintiff, fled his vehicle after being pulled over. A chase ensued, during which Jennings stole a police officer's revolver and shot him in the leg. Jennings continued to run, and additional officers were called to assist in the chase, including the defendant Dawley, an off-duty officer. *Id.* After two hours of searching and a gun battle, which resulted in Dawley and Jennings each receiving five gunshot wounds, another officer, the defendant Fetterman, jumped on Jennings' back and struggled to handcuff him. *Id.* Fetterman was able to handcuff Jennings afer hitting and kicking him in the head, ribs, and groin. *Id.* at 164. After a jury trial, Jennings was convicted of attempted homicide. *Id.*

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Following his conviction, which was upheld on appeal, Jennings filed lawsuits against Fetterman and Dawley for violations of his constitutional rights. *Id.* Jennings claimed that Dawley used excessive force by shooting at him while under the influence of alcohol and that Fetterman violated his civil rights by calling Dawley to return to duty even though he knew that Dawley was intoxicated. *Id.* The Third Circuit upheld the district court's determination that Jennings' claims were barred as a matter of law by Heck. *Id.* The court explained that in order for Jennings to succeed on his excessive force claim, he would have had to show that Dawley's shooting at him was unreasonable in light of the circumstances. *Id.* The court reasoned that Jennings' attempted homicide conviction "necessarily meant that the jury had rejected Jennings' theory that he had shot Dawley in self defense." *Id.* The court further reasoned "that a judgment in favor of Jennings on his excessive force claim would contradict this jury finding and, by logical extension, invalidate the attempted homicide conviction." *Id.; see also Smith v. Mitchell*, No. 97-6115, 2000 U.S. Dist. LEXIS 20778, 2000 WL 33256676, *3 (D.N.J. Nov. 21, 2000) (holding that a finding for the plaintiff in on his excessive force claim would necessarily imply the invalidity of the plaintiff's conviction for aggravated assault).

Cases in other jurisdictions support this conclusion as well. In *Cummings v. City of Akron*, 418 F.3d 676, 679 (6th Cir. 2005), two police officers, defendants Sherman and Vaughn, investigated a domestic disturbance between the plaintiff Cummings and his

girlfriend. Cummings refused to allow the officers to enter his home, but the officers smelled marijuana. *Id.* Cummings tried to close the door, but Sherman's foot was inside the doorway. *Id.* Sherman and Vaughn both pushed the door open, entered Cummings' home, and a struggle ensued. *Id.* The officers attempted to arrest Cummings, but he resisted, running out onto his front porch. *Id.* at 680. During the struggle, Sherman and Vaughn struck Cummings with their fists and batons, sprayed him with pepper spray, and a third officer arrived on the scene and used a Taser gun on him. *Id.* Once Cummings was finally subdued, he was handcuffed and taken into police custody. *Id.* Cummings was charged with various offenses, but he pleaded no contest to a reduced charge of misdemeanor assault on Vaughn, and all other charges against him were dropped. *Id.*

Cummings then filed a lawsuit against Vaughn and Sherman, alleging that they used excessive force in effecting his arrest. *Id.* The district court granted summary judgment in favor of Vaughn and Sherman, holding that *Heck* barred Cummings' claims. *Id.* at 681. On appeal, the Sixth Circuit affirmed that district court's decision:

> We agree with the magistrate judge that success on Cummings' excessive force claim would necessarily imply the invalidity of his state assault conviction. The struggle between Cummings and the officers gave rise to both Cummings' assault conviction and the excessive force claim, and the two are

> inextricably intertwined. Additionally, Cummings could have raised excessive force as a defense to the assault charge, but instead he chose not to contest the charge. Thus, we hold that *Heck* bars Cummings' excessive force claim from moving forward, and we affirm the district court's grant of summary judgment to defendants on this claim.

Id. at 682-83.

Similarly, in *Hudson v. Hughes*, 98 F.3d 868, 873 (5th Cir. 1996), the plaintiff, Hudson, who had been convicted of battery of an officer, filed a claim for excessive force against the arresting officers. The court affirmed the district court's grant of summary judgment in favor of the officers based on *Heck*. *Id.* The court explained that because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that the officers used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer. *Id.* "This is true because the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines that conviction." *Id.*

The rationales of *Jennings*, *Cummings*, and *Hudson* apply to this case. Here, as in those cases, because the conviction and events giving rise to

Garrison's excessive force claim are inextricably intertwined, and because Garrison pled guilty to assault, an offense for which self-defense is a defense, a judgment in favor of Garrison on his excessive force claim would undermine his conviction. Accordingly, Garrison's § 1983 claim for excessive force claim is barred.

B. Whether Garrison's guilty pleas to the disorderly persons offenses of simple assault and resisting arrest amount to judicial estoppel of his *Fourth Amendment* claims

Porch argues in the alternative that the doctrine of judicial estoppel bars Garrison's Fourth Amendment claims. Because Garrison's claims for unreasonable seizure and excessive force are barred by *Heck*, the Court does not need to decide whether the claims are barred by judicial estoppel.

C. Whether Porch is entitled to qualified immunity for Garrison's Fourth Amendment claims

Porch asserts another alternative argument by contending that he is entitled to qualified immunity on Garrison's Fourth Amendment claims. As with his judicial estoppel argument, because Garrison's constitutional claims are barred by *Heck*, the Court does not need to decide whether Porch is entitled to qualified immunity.

D. Whether Garrison's conspiracy claims under § 1983 should be dismissed

In his Complaint, Garrison has asserted a claim that Porch and all the original defendants conspired to violate his constitutional rights. Porch has moved for summary judgment on this claim.

Garrison's conspiracy claim fails for two reasons. First, Garrison's constitutional violation claims are barred by *Heck*, and, without any valid constitutional claims, Porch cannot be held to have conspired to violate his constitutional rights. Second, Garrison has not opposed Porch's motion on this claim, and he has not set forth any evidence that Porch acted "in concert to commit an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose." *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974) (citation omitted). Even though a plaintiff may present both direct and circumstantial evidence of an agreement to conspire, *Ball v. Paramount Pictures*, 169 F.2d 317, 319 (3d Cir. 1948), Garrison has failed to provide any evidence. Because Garrison must identify specific facts and affirmative evidence that contradict those offered by the moving party in order to withstand a properly supported motion for summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), judgment in favor of Porch on Garrison's conspiracy claim must be granted.

E. Whether Garrison's guilty pleas to the disorderly persons offenses of simple assault and resisting arrest precludes his tort claims

Porch contends that Garrison's tort claims should be dismissed based upon the immunity set forth in the New Jersey Tort Claims Act (NJTCA). Garrison argues that Porch is not entitled to NJTCA immunity.

The NJTCA provides absolute immunity to a public employee for "any injury caused by . . . a person resisting arrest or evading arrest" or "any injury resulting from or caused by a law enforcement officer's pursuit of a person." N.J. Stat. Ann. 59:5-2(b), (c). Only a finding that the officer engaged in "willful misconduct" abrogates that immunity. *See Tice v. Cramer*, 133 N.J. 347, 627 A.2d 1090, 1105 (N.J. 1993) (citing N.J. Stat. Ann. 59:3-14(a) ("Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.")).

What constitutes "willful misconduct" is not expressly defined in the statute. The New Jersey Supreme Court has interpreted "willful misconduct" to require "'much more' than mere negligence," and it "will fall somewhere on the continuum between simple negligence and the intentional infliction of harm." *Alston v. City of Camden*, 168 N.J. 170, 773 A.2d 693, 702 (N.J. 2001). In the context of police vehicular pursuits, the New Jersey Supreme Court has instructed that willful

misconduct has two elements: "1) disobeying either a specific lawful command of a superior or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated and, intending to violate it." *Fielder v. Stonack*, 141 N.J. 101, 661 A.2d 231, 243 (N.J. 1995).

To the extent that the requirement that the knowing and intentional violation of a direct order applies to a police officer dealing with a person who is resisting arrest, there is nothing in the record to show that Porch knowingly and intentionally disobeyed a superior officer's command during his interaction with Garrison. Thus, under this theory, Porch is immune from suit on Garrison's tort claims.

Even if that requirement does not apply in this case, however, the principles of *Heck* weigh in favor of Porch's immunity. In crafting the rule that a plaintiff cannot maintain a § 1983 damages claim that would "necessarily imply the invalidity" of the plaintiff's conviction or sentence, the Supreme Court looked to tort law, stating, "We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." *Heck v. Humphrey*, 512 U.S. 477, 485, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). The need for finality and consistency speaks to this longstanding rule that limits the ability of a tort plaintiff to collaterally

attack his criminal convictions. See id. A finding that Porch was liable to Garrison for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and assault and battery would allow Garrison to collaterally attack his resisting arrest and simple assault convictions, and would run contrary to the need for finality and consistency. Thus, whether under the NJTCA immunity provision or *Heck*, Garrison's tort claims against Porch must be dismissed.

G. Whether Porch is entitled to summary judgment on his assault and battery counterclaim as to Garrison's liability

Porch has also moved for summary judgment as to liability on his assault and battery counterclaim against Garrison. This claim, as well as his other counterclaims, presents the issue of whether a police officer can sue an arrestee for injuries the officer sustained while he was making the arrest. In 1960, the New Jersey Supreme Court adopted the common law doctrine, usually referred to as the "fireman's rule," which bars a firefighter from recovering damages against a property owner for injuries received while battling a fire caused by the property owner's negligence. *See Ruiz v. Mero*, 385 N.J. Super. 382, 897 A.2d 407, 408 (N.J. Super. Ct. App. Div. 2006) (citing *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (N.J. 1960)). The fireman's rule was then extended to police officers. See *id.* at 409 (discussing *Rosa v. Dunkin' Donuts*, 122 N.J. 66, 583 A.2d 1129 (N.J. 1991), which applied the fireman's rule to a police officer who sued a property owner for injuries sustained when

he slipped on a negligently-maintained floor while carrying an injured person from the scene).

In 1993, the New Jersey Legislature enacted a statute entitled, "Rights of recovery granted to law enforcement officers, fire fighters and emergency service personnel or their estates in cases of injury or death resulting from neglect, willful omission or culpable conduct," which provides:

> In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease, or, in the case of death, a representative of that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's estate, may seek recovery and damages from the person or entity whose

> neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

N.J. Stat. Ann. 2A:62A-21.

On the statute's face, it appears that Porch, a law enforcement officer, is permitted to seek damages from Garrison, whose willful conduct Porch claims resulted in his injury. Since the enactment of this statute, the New Jersey courts have been split on its interpretation, however. The appellate court in *Kelly v. Ely*, 336 N.J. Super. 354, 764 A.2d 1031, 1034 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 772 A.2d 937, 167 N.J. 635 (N.J. 2001), determined that the statute did not abrogate the fireman's rule, "absent a clearer declaration of the legislative intent to achieve such an end." The appellate court in *Ruiz v. Mero*, however, found the contrary, holding that the text, context, and legislative history of the statute lead "to the same result: abrogation of the fireman's rule." *Ruiz*, 897 A.2d at 411 (permitting an on-duty police officer to bring tort claims against the owner of a club where he was attacked and injured). The Third Circuit Court of Appeals has also had the opportunity to address the issue in *Roma v. United States*, 344 F.3d 352, 359-62 (3d Cir. 2003), where it predicted that the New Jersey Supreme Court "would not follow Kelly because the language of the statute was clear and its purpose unmistakable and permitted the plaintiff firefighter to pursue his cause of action against the possibly negligent parties." *Ruiz*, 897 A.2d at 410-11 (discussing *Roma*).

The conflict is close to being resolved. The *Ruiz* case is now on appeal to the New Jersey Supreme Court, which, on January 29, 2007, heard oral arguments on the issue. *See Ruiz v. Mero*, 385 N.J. Super. 382, 897 A.2d 407, 408 (N.J. Super. Ct. App. Div. 2006), *cert. granted*, 907 A.2d 1012, 188 N.J. 352 (N.J. 2006); http://www.judiciary.state.nj.us/calendars/sc_appeal.htm. To date, the court has not issued its opinion.

In his opposition, Garrison does not address Porch's motion for summary judgment on his assault and battery counterclaim as to liability, and Porch does not address the fireman's rule, the New Jersey statute, or any of the cases discussing the rule or the statute. Although the fireman's rule and the case law primarily concern a police officer suing a property owner for damages, the statute appears to permit on-duty police officers' claims for any tort committed by any individual. Thus, because the statute's affect on the fireman's rule is unsettled and currently being deliberated by New Jersey's highest court, this Court will deny without prejudice Porch's motion, and stay Porch's counterclaims until the issue of whether Porch may maintain state law tort claims against Garrison is addressed by the New Jersey Supreme Court.

IV. CONCLUSION

For the reasons expressed above, Porch is entitled to summary judgment on Garrison's § 1983 claims and all his state law claims. Porch's motion for summary judgment as to Garrison's liability on his counterclaim for assault and battery is dismissed without prejudice, and all of Porch's state law counterclaims are stayed pending the decision of the New Jersey Supreme Court in *Ruiz v. Mero*. An appropriate Order will be entered.

Dated: March 9, 2007

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 18, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2453

MICHAEL GARRISON,

Appellant

v.

WILLIAM PORCH, Police Officer;
CITY OF NORTH WILDWOOD;
NORTH WILDWOOD POLICE DEPARTMENT;
DENISE WATSON; JOHN MCBRIDE;
ROBERT CARUSO; ROBERT MATTEUCCI;
PAUL SKILL; TED HINDES, Police Officers

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, and VANASKIE, *Circuit Judges*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: May 18, 2010

Supreme Court, U.S.
FILED
NOV 10 2010
OFFICE OF THE CLERK

No. 10-233

IN THE

Supreme Court of the United States

WILLIAM PORCH, Police Officer,

Petitioner,

v.

MICHAEL GARRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a panel of the Third Circuit was correct in concluding that recovery by plaintiff on his § 1983 claim for excessive force would not necessarily imply the invalidity of plaintiff's conviction for simple assault, given that under plaintiff's version of the disputed facts, plaintiff's assault on the police officer occurred before the officer responded with the force that plaintiff claims was excessive.

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COUNTERSTATEMENT OF THE CASE

In this § 1983 action, plaintiff Michael Garrison seeks to recover damages for severe injury caused by defendant William Porch's use of allegedly excessive force during an incident that resulted in Garrison's arrest for public urination, disorderly conduct, resisting arrest and assault. Porch, a police officer employed by the City of Wildwood, New Jersey, broke Garrison's neck. Garrison later pled guilty to resisting arrest and simple assault, both of which are disorderly person's offenses under New Jersey law.

The district court granted Porch's motion for summary judgment, concluding that Garrison's excessive force claim is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). According to the district court, Garrison could not possibly succeed on his excessive force claim without implying the invalidity of his conviction for simple assault because Garrison did not deny committing the assault and did not claim that the assault was committed in self-defense of the allegedly excessive force used by Porch. Pet.App. at 25a-26a; *see also* Pet.App. at 7a.

A panel of the Third Circuit vacated and reversed in a non-precedential decision. Construing the facts in the light most favorable to Garrison as the non-moving party on the summary judgment motion, the panel found that at the beginning of the incident, Garrison spun around and raised his hands aggressively as if to strike Porch. In response to that simple assault, Porch grabbed Garrison by the arm, forced him to the ground and jumped on Garrison's back, breaking Garrison's neck.

Pet.App. at 2a-3a. The panel concluded that under *Heck*, Garrison's conviction for simple assault does not bar his § 1983 claim because if Garrison were to prevail on his claim, it would not necessarily imply the invalidity of his conviction for simple assault: "A reasonable jury could find that, even considering Garrison's initial behavior which constituted a simple assault, Porch used an unreasonable amount of force in arresting him, and in doing so violated his constitutional rights." Pet.App. at 10a-11a.

The Third Circuit denied Porch's petition for rehearing en banc. Pet.App. at 39a-40a.

REASONS FOR DENYING THE PETITION

I. THE PETITION MISSTATES RELEVANT FACTS.

The petition misstates the facts in three important respects. First, the petition states that the assault and the allegedly excessive force were "inextricably intertwined" with other events that occurred during the incident, such as Porch's completion of the handcuffing of Garrison. Second, the petition implies that the assault was committed in response to the allegedly excessive force, as opposed to the allegedly excessive force being inflicted in response to the assault. Third, the petition states that Garrison admitted that the assault caused Porch to sustain injury. These factual misstatements form the foundation of the petition.

A. There Was a Factual Dispute as to Whether the Assault and the Use of Allegedly Excessive Force Were "Inextricably Intertwined" With Subsequent Events.

The petition repeatedly states that the assault by Garrison and the allegedly excessive force used by Porch are "inextricably intertwined" with subsequent events, and it implies that the assault occurred *after* the use of the allegedly excessive force. *See, e.g.*, Petition at 15 (stating that "here, the alleged excessive force and the assault on the police officer were inextricably intertwined in a single course of events unbroken by the subject being restrained, handcuffed or submitting to a lawful arrest"); Petition at 33 (stating that "Garrison's theoretical argument that he resisted arrest and attempted to assault Porch before Porch used allegedly excessive force was completely at odds with the summary judgment record").

The district court and the court of appeals were, of course, required to construe the facts in the light most favorable to Garrison, the party opposing summary judgment. *See* Pet.App. at 2a. Under Garrison's version of the events, Porch used excessive force in direct response to Garrison's simple assault – an assault that consisted of Garrison's raising clenched fists toward Porch in a threatening manner. Subsequent events are analytically distinct from the assault and from Porch's responsive use of force.

It was undisputed that on the evening of March 29, 2002, Garrison went with friends to two or three bars, where he consumed alcoholic beverages and took an

ecstasy pill. Pet.App. at 13a. At approximately 1:50 a.m., Garrison began to urinate outside Keenan's Bar. Porch, a police officer dressed in plain clothes, saw Garrison urinating. *Id.*

At this point, the parties' versions of the events diverged. Pet.App. at 14a. According to Garrison's deposition testimony, Porch approached Garrison, grabbed his bicep, turned him around, and held both of Garrison's wrists[1] in his hands. When Garrison turned around, he had both fists clenched up near his chin with the knuckles facing away from his body. Pet.App. at 14a; JA160, ¶34; JA399, ¶34.[2]

Garrison next remembered Porch pulling him to the ground. Pet.App. at 14a. He recalled that his ear and stomach were on the sidewalk, that his face was forced into the ground, and that he heard the bones breaking in the back of his neck. Pet.App. at 14a. Garrison recalled telling Porch, "I think you broke my neck," to which Porch, leaning down, replied, "Well, you shouldn't have been resisting arrest." JA163, ¶50; JA400, ¶50.

Porch disagreed with this description of the events. He recalled that after he grabbed Garrison and told him he was under arrest, Garrison resisted and attempted to head-butt him. Porch recalled that Garrison then spun around with his fist raised in a motion to hit Porch, that Porch pulled Garrison to the ground, and that

---

1. The district court opinion mistakenly says "fists" instead of "wrists." Pet.App. at 14a.

2. References to "JA" are to the Joint Appendix filed in the Third Circuit.

Garrison continued to thrash his (Garrison's) entire body to avoid handcuffing. Porch recalled that he radioed for back-up after securing one handcuff and that, when another officer arrived, Porch sat down below Garrison's knees to stop him from kicking. According to Porch, it was at this point that Garrison began to complain of neck and back pain and that Garrison told Porch that Porch broke his neck. Pet.App. at 14a-15a.

Garrison pled guilty to an amended charge of simple assault in violation of N.J. Stat. Ann. 2C:12-1a and to purposefully resisting arrest in violation of N.J. Stat. Ann. 2C:29-2a. Pet.App. at 16a-17a.[3] As to simple assault, New Jersey Stat. Ann. 2C:12-1 provides:

> a. Simple assault. A person is guilty of assault if he:
>
> (1) **Attempts to cause** or purposely, knowingly or recklessly causes **bodily injury to another; or**
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) **Attempts by physical menace to put another in fear of imminent serious bodily injury.**
>
> Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered

3. The statutes are cited in the district court's opinion as "N.J. Stat. Ann. 2C:12-1A" and "N.J. Stat. Ann. 2C:29-2A." Pet.App. at 16a-17a n.2.

> into by mutual consent, in which case it is a petty disorderly persons offense.

New Jersey Stat. Ann. 2C:12-1a; *see* Pet.App. 16a-17a n.2 (emphasis added).

Although Porch's version of the facts is different, Garrison's version alleges that his assault occurred before Porch used excessive force. More specifically, a jury could find the following sequence of events: (1) Porch approached Garrison, grabbed his bicep, turned him around, and held both of his wrists in his hands; (2) when Garrison turned around, he had both fists clenched up near his chin with the knuckles facing Porch; (3) Porch forced Garrison to the ground so that his ear and stomach were on the sidewalk; (4) Porch then forced Garrison's face into the ground; and (5) it was at that point that Garrison heard the bones breaking in the back of his neck. The assault would be Garrison's clenching of his fists toward Porch, which was either an attempt to cause bodily injury or an attempt to put Porch in fear of imminent serious bodily injury. In response to that assault, Porch used force so excessive that it broke Garrison's neck.

When viewed in the light most favorable to Garrison, the summary judgment record does not support Porch's contention that the assault and the allegedly excessive force were "inextricably intertwined" with subsequent events, such as Garrison's kicking or Porch's completion of the handcuffing. A reasonable jury could find that the allegedly excessive force was used by Porch in direct response to the simple assault.

B. There Was a Factual Dispute as to Whether Garrison Caused Porch to Sustain Any Injury.

Porch also mischaracterizes the nature of the assault committed by Garrison. Porch asserts that "Garrison's § 1983 claim is barred pursuant to *Heck* because **Garrison's admitted facts** on the summary judgment record, **that he both attempted to cause and subsequently did in fact cause bodily injury to Porch** by admittedly repeatedly kicking him while Porch was attempting to arrest him, would necessarily imply the invalidity of the prior conviction for assault, N.J.S.A. 2C:12-1(a)." Petition at 4-5 (emphasis added). In the same vein, Porch asserts that the summary judgment record shows that "Porch was injured from Garrison's kicks[.]" Petition at 20.

The issue of whether Garrison caused Porch to sustain any injury was sharply disputed. Garrison denied injuring Porch, and Porch's official investigation report makes no mention of Garrison making contact with Porch using either his fists or his legs. JA416-22. On the summary judgment motion, when Garrison stated as fact that "Officer Porch never mentions Plaintiff Garrison making contact with his person utilizing his fists or legs in his official investigation report dated April 2, 2002" (JA409, ¶2), Porch denied the statement – but not on the ground that contact was actually made, and without mentioning Garrison's kicks. Instead, Porch stated: "The report contains numerous accounts of Plaintiff's physically resisting arrest, raising his hands to strike Officer Porch, and the 'alarming personal fear' [Porch] felt." JA591, ¶2.

Consistent with Porch's official report, the criminal complaint issued to Garrison for resisting arrest and aggravated assault made no mention of actual contact or of any injury sustained by Porch. With respect to aggravated assault, the complaint alleged that Garrison "attempt[ed] to cause bodily injury" to Porch by "making a fist and raising his fist and arm towards the officer." JA210. No contact was alleged. *Id.* The ensuing indictment for aggravated assault identified no specific act of assault, stating only that Garrison "did attempt to cause and/or purposely, knowingly or recklessly cause[d] bodily injury" to Porch. JA214.

Garrison pled guilty to an amended charge of simple assault. Pet.App. at 16a. He thus admitted that he "[a]ttempt[ed] to cause or purposely, knowingly or recklessly cause[d] bodily injury to another" or "[a]ttempt[ed] by physical menace to put another in fear of imminent serious bodily injury." N.J. Stat. Ann. 2C:12-1a(1) & (3). As is demonstrated above, the simple assault charge to which Garrison pled guilty is consistent with Garrison's denial that he caused Porch to sustain any injury. That statute can be violated even by an attempt to cause bodily injury to another or by "[a]ttempt[ing] by physical menace to put another in fear of imminent serious bodily injury." Porch's statement that he felt "alarming personal fear" (JA591, ¶2) is consistent with the type of simple assault in which no physical contact is made.

Finally, it may be reasonably presumed that if Garrison caused Porch to sustain any injury, Porch would have pursued a counterclaim against Garrison. Porch did file an amended counterclaim, in which he asserted

claims for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and common law negligence. JA135-42. However, Porch thereafter consented to the dismissal of his counterclaim with prejudice. JA670.1; *see* Petition at 13.

By basing his petition on an inaccurate statement of facts, Porch undermines his legal arguments. His failure to present the facts with accuracy is sufficient reason for the Court to deny the petition. Sup.Ct.R. 14.4.

II. THE PANEL'S DECISION IS GROUNDED IN THE PARTICULAR FACTS OF THIS CASE AND DOES NOT REFLECT A CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The panel stated that although the Third Circuit "has not squarely addressed the issue of whether a simple assault conviction necessarily serves as a bar to a § 1983 excessive force claim under *Heck*, other courts of appeals to have considered factually similar cases have generally held that the mere fact of a conviction for assault or similar conviction arising out of the same incident does not automatically preclude recovery on an excessive force claim brought under § 1983." Pet.App. at 9a. The panel cited cases from five other circuits, followed by a "*But see*" citation to *Cummings v. City of Akron*, 418 F.3d 676, 682-83 (6th Cir 2005). *Id.* The panel then stated: "We agree with the majority of other courts of appeals to have faced this issue in rejecting Porch's argument that Garrison's conviction for simple assault automatically precludes him recovering on his § 1983 claim." Pet.App. at 9a-10a.

Porch seizes on this language to argue that the courts are in conflict. However, the outcome of each case cited, like the outcome of this case, depended on the particular facts and statutes involved. All of the decisions recognized that under *Heck*, an assault or analogous conviction **may** preclude recovery on a § 1983 excessive force claim. Like the panel here, however, the courts examined the record of the particular case to determine the sequence of events and the elements of the statute and then reached a determination on the basis of the particular facts.

For example, in *Dyer v. Lee*, 488 F.3d 876, 882 (11th Cir. 2007), the court looked "at the beginning and at the end of the altercation" and determined that, because the allegedly excessive force did not occur until after plaintiff kicked the officer, there could be "no argument that Dyer's initial kick could have been justified as self-defense." *Id.* Similarly, in *Thore v. Howe*, 466 F.3d 173, 180 (1st Cir. 2006), the court stated: "Just as it is true that a § 1983 excessive force claim after an assault conviction is not necessarily barred by *Heck*, it is also true that it is not necessarily free from *Heck*. The excessive force claim and the conviction may be so interrelated factually as to bar the § 1983 claim."

The Sixth Circuit's decision in *Cummings v. City of Akron*, 418 F.3d 676, 682-83 (6th Cir 2005), cited by the Third Circuit panel after a "*But see*" citation, is different only because that court used seemingly categorical language when concluding that plaintiff's assault conviction meant that his excessive force claim was *Heck*-barred. The court stated:

> [S]uccess on Cummings' excessive force claim would necessarily imply the invalidity of his state assault conviction. The struggle between Cummings and the officers gave rise to both Cummings' assault conviction and the excessive force claim, and the two are inextricably intertwined. Additionally, Cummings could have raised excessive force as a defense to the assault charge, but instead he chose not to contest the charge. Thus, we hold that *Heck* bars Cummings' excessive force claim from moving forward, and we affirm the district court's grant of summary judgment to defendants on this claim.

Cummings, 418 F.3d at 682-83.

It may well be that in *Cummings*, the assault conviction and the excessive force claim were "inextricably intertwined" as a result of the protracted back-and-forth struggle described in the opinion – a struggle that was not susceptible to a finding that the assault was complete before the allegedly excessive force was used. If so, the panel in *Garrison*, and the courts in the other cases it cited as being in the "majority," would likely have reached the same result as the Sixth Circuit. What sets *Cummings* apart is not its holding but its failure to acknowledge that in a different factual scenario, the assault conviction might not bar the § 1983 claim.

III. PORCH'S OTHER ARGUMENTS ARE ALSO UNCONVINCING.

Porch proffers several additional reasons for granting the petition. They do not withstand scrutiny.

A. The Third Circuit Did Not "Create a Different Standard of Review Than Required by *Heck*."

Porch asserts that "the Third Circuit's reference to a split among the circuit courts of appeals led it to create a different standard of review than required by *Heck*." Petition at 16. That is not so.

First, the decision is not precedential and therefore did not "create" a standard of any sort. The Third Circuit panel wrote "solely for the benefit of the parties." Pet.App. at 2a. Under the Third Circuit's Internal Operating Procedures, such a decision "do[es] not have the imprimatur of the full court," does not bind the full court, and is not precedent for the district courts of the Third Circuit. *In re Grand Jury Investigation*, 445 F.3d 266, 278 (3d Cir.), *cert. denied*, 549 U.S. 997 (2006).

Second, Porch has seized upon a mere semantic distinction between the Third Circuit panel's characterization of the key issue in the case and the expression of the applicable standard in *Heck*. The petition states:

> [T]he Third Circuit referenced a split in the circuit courts of appeals on the issue of whether an assault conviction for the person arrested **automatically precludes** that

> person from recovering on his § 1983 claim against the arresting officer.

Petition at 15 (emphasis in original).

In fact, the panel explained that although the Third Circuit "has not squarely addressed the issue of whether a simple assault conviction necessarily serves as a bar to a § 1983 excessive force claim under *Heck*, other courts of appeals to have considered factually similar cases have generally held that the mere fact of a conviction for assault or similar conviction arising out of the same incident does not automatically preclude recovery on an excessive force claim brought under § 1983." Pet.App. at 9a. Earlier in its opinion, the panel noted that under *Heck*, "a plaintiff may not recover damages under § 1983 if doing so would [necessarily] imply the invalidity of a prior conviction." Pet.App. at 7a (citing *Heck*, 512 U.S. at 487).

The petition focuses on the panel's use of the words "automatically preclude" to argue that the decision veers from *Heck*. However, the panel used that phrase in response to the district court's holding that Garrison's assault conviction precluded recovery on his § 1983 claim. *See* Pet.App. at 7a ("The District Court held that Garrison could not possibly succeed on his excessive force claim without implying the invalidity of his conviction for simple assault"). In the district court's view, "[i]t would be incongruous to hold that Garrison 'attempted to cause or purposely, knowingly or recklessly caused bodily injury to' Porch, while at the same time Porch's use of force in effecting Garrison's arrest was excessive." Pet.App. at 25a. The district court continued as follows:

> The incongruity is even more evident when looking at what Garrison needs to prove to prevail on his excessive force claim. To prevail on his excessive force claim, Garrison must prove that Porch's use of force was not objectively reasonable. To do so, Garrison could try to argue that he never attempted to, or actually did, cause bodily injury to Porch. That argument, however, would contradict his conviction for assaulting Porch. Garrison could also try to argue that the force used by Porch was not reasonably necessary. This second claim would invalidate his assault conviction because it would imply that he acted in self-defense, which is a justification defense under New Jersey law.

Pet.App. at 25a.

In short, the Third Circuit panel understood – and correctly applied – the *Heck* standard. The panel used the phrase "automatically preclude" as a shorthand description of the district court's holding that Garrison could not possibly succeed on his § 1983 claim without implying the invalidity of his conviction for simple assault. The panel's characterization of *Heck* was correct, as was its description of the district court's holding.

B. The Panel Did Not Depart From Standard Judicial Conduct.

According to Porch, the panel erred by "accept[ing] Garrison's argument that there was a version of the

events which would prevent the court from barring his subsequent excessive force claim under *Heck*." Petition at 19. Porch disparages Garrison's version of the events as "nothing more than a theoretical possibility." *Id.* at 20. He then says that the panel's acceptance of Garrison's argument was "not an erroneous factual finding, but rather an acceptance of an argument that was completely at odds with the summary judgment record, which is a departure from standard judicial conduct." *Id.*

Porch thus attempts to accomplish two things: (1) to avoid the import of the final paragraph of Supreme Court Rule 10, which states that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"; and (2) to fit his argument within the language of Rule 10(a), which indicates that the Court considers granting certiorari when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." But this argument is like trying to fit a square peg into a round hole.

As is demonstrated in Point I, the summary judgment record, when viewed in the light most favorable to Garrison, supported the claim that Garrison assaulted Porch by raising his clenched fists in a threatening manner and that Porch responded to that simple assault by using excessive force. If a jury were to accept Garrison's version of the events, it would find that the assault was complete by the time Porch responded with the allegedly excessive force. The panel emphasized that its holding is "in no way an assessment

of the merits of Garrison's claim." Pet.App. at 11a n.3. The panel reversed the district court "solely because Garrison's claim for relief is not necessarily inconsistent with the fact of his simple assault conviction." *Id.*

Even assuming *arguendo* that the panel's assessment of the summary judgment record was erroneous, that would not constitute such a substantial departure "from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Sup.Ct.R. 10(a). The error would consist of nothing more than erroneous factual findings. *Cf. Key v. Wise*, 454 U.S. 1103, 1104, 1005 (1981) (Brennan, J., dissenting from denial of petition for writ of certiorari) (stating that where court of appeals dismissed appeal from district court order that, in dissenters' view, "was a patent flouting of [a] congressional mandate preempting state court jurisdiction," the issue was "of such moment," and the asserted error was "so egregious," as to call for an exercise of Court's supervisory power).

C. The Panel Did Not Misstate the New Jersey Simple Assault Statute in Any Material Way.

In a footnote paraphrasing the New Jersey simple assault statute, the panel did not mention the portion that addresses "purposely, knowingly or recklessly caus[ing] bodily injury to another." Pet.App. at 3a n.1; *see* New Jersey Stat. Ann. 2C:12-1a. The panel then stated: "Since no deadly weapon was used in the incident, we must conclude that Garrison was convicted of either attempting or threatening to cause bodily damage to Porch.... Garrison denies actually striking Porch." *Id.*

On the basis of this footnote, Porch makes the following argument:

> The Third Circuit should have noted that by pleading guilty to assault Garrison admitted that he not only attempted to cause but also purposely, knowingly or recklessly did cause bodily injury to Porch. The Petitioner concedes that Supreme Court Rule 10 states that a misapplication of a properly stated rule of law is rarely the error for which a Petition for a Writ of Certiorari is granted. In this case, however, it was not the misapplication of the properly stated rule of law which led to the error, but a complete misstatement of the rule of law followed by an analysis of the facts of this case using the misstated and incomplete statute which led to the error.

Petition at 22.

This argument is correct only insofar as it identifies an omission in the panel's paraphrasing of the statute. Contrary to Porch's argument, Garrison's guilty plea is consistent with two portions of the simple assault statute that do not require a conclusion that he "purposely, knowingly or recklessly did cause bodily injury to Porch." The assault was Garrison's clenching of his fists toward Porch, which was either an "attempt[] to cause ... bodily injury to another" or an "attempt[] by physical menace to put another in fear of imminent serious bodily injury." New Jersey Stat. Ann. 2C:12-1a (1) & (3); *see* Point I *supra*.

The panel's reversal of the district court did not result from any misunderstanding of the simple assault statute. The central theme of the decision is that, when the summary judgment record is viewed in the light most favorable to Garrison, Garrison committed an assault to which Porch responded with excessive force – and that, therefore, recovery on Garrison's § 1983 excessive force claim would not necessarily imply the invalidity of the conviction for simple assault. Any misstatement in the footnote is irrelevant to the holding.

D. The Panel Did Not Err in Finding the Availability of Self-Defense to Be Irrelevant Under the Facts of This Case.

In Point IV of the petition, Porch again asserts that the panel erroneously accepted Garrison's "theoretical argument that his resistance and assault only occurred before the allegedly excessive force." Petition at 23. As is explained in Point I, however, Garrison's position was supported by the summary judgment record.

Porch also argues that the panel "erred when it accepted Garrison's argument that there was only an attempted assault, which was only committed before Porch used excessive force, **not to repel the excessive force.**" Petition at 24 (emphasis in original). There was no such error.

First, Garrison never argued that there was only an "attempted assault," and the panel recognized that Garrison pled guilty to simple assault. Garrison maintained, however, that he did not cause Porch to sustain any injury and that Porch responded to the

assault with excessive force. Again, the panel recognized that under this version of the events, which had to be accepted as true for purposes of the summary judgment motion, recovery on the § 1983 excessive force claim would not necessarily imply the invalidity of the conviction.

Second, the panel recognized that contrary to the district court's analysis, to prevail on his excessive force claim Garrison would not have to "try to argue that he never attempted to, or actually did, cause bodily injury to Porch," or that he acted in self-defense. See Pet.App. at 25a. The panel explained:

> Porch ... argues that because Garrison could have, but did not used [sic] self-defense as an affirmative defense to the charge of simple assault, his conviction establishes as a matter of law that his conduct was not justified, and he is therefore barred by *Heck* from recovering on his excessive force claim. However, due to the nature of Garrison's factual claims as alleged in his complaint and pleadings, the issue of self-defense is irrelevant. Garrison has not claimed that his act of simple assault was committed to protect himself. He acknowledges that he assaulted Porch before Porch allegedly used excessive force. He claims that after his act of assault, Porch then responded by using a degree of force that was much greater than was reasonably necessary to subdue him and place him under arrest. This is clearly a claim of excessive force in response to an assault, and

> the theoretical possibility of a self-defense claim in other simple assault cases is of no relevance to the present case.

Pet.App. at 10a.

The panel's conclusion was correct given the particular facts of this case. Porch was not justified in responding to Porch's simple assault with excessive force, and the unavailability of a self-defense claim with respect to that offense suggests nothing about whether the force used by Porch was excessive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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